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Supreme Court of the United States

OCTOBER TERM, 1951

No. 2

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE AND FRANK D'INNOCENZIO, PETITIONERS,

vs.

DUANE E. MINARD, JR., PROSECUTOR FOR ESSEX COUNTY, NEW JERSEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 15, 1950.

CERTIORARI GRANTED MAY 14, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE AND FRANK D'INNOCENZIO, PETITIONERS,

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INDEX

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[fol. a]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket 10,211

GEORGE STEFANELLI, Plaintiff-Appellant,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, et al., Defendants-Respondents

Docket 10,212

JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO, Plaintiffs-Appellants,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersy, et al., Defendants-Respondents

On Appeals from Orders of the United States District Court, District of New Jersey

Appendix to Appellants' Brief

[fol. 1] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

DOCKET ENTRIES

4-11-50 Complaint filed.
4-11-50 Order to Show Cause re: restraint filed. (Meaney)
4-11-50 Summons issued.
4-11-50 Notice of Allocation (Newark) filed.
4-12-50 Notice of motion to dismiss complaint with acknowledgment of service filed. (ret. 4-17-50)
4-14-50 Notice of motion to dismiss complaint as to F. O'Neill, L. W. Sheridan and K. Lacey, with acknowledgment of service filed 4-13-50. (Ret. 4-13-50.)
4-19-50 Summons returned served on all defendants on 4-11-50 together with affidavit of service of order to show cause filed.

4-19-50 Hearing on order to show cause re: restraint. Decision reserved. (Meaney) (4-17-50).

4-19-50 Ordered hearing on motions to dismiss complaint adjourned without date. (Meaney) (4-17-50).

4-26-50 Ordered application for preliminary injunction denied. Ordered motion to dismiss complaint granted. Orders to be submitted. (Meaney) (4-24-50).

4-26-50 Order for dismissal, with costs, in favor of the defendants, Duane E. Minard, Jr., John Schultz, William Anderson, Frank O'Neill, Lawrence W. Sheridan and Kenneth Lacey and against the plaintiff, George Stefanelli, filed. (Meaney) Notice mailed.

[fol. 2] 4-26-50 Statement of Defendant's costs, taxed at $20.00, filed.

4-26-50 Notice of Appeal filed.

4-26-50. Copies forwarded to William Caruso, Esq., Charles Handler, Esq., and Clerk, U. S. C. C. A.

5-17-50 Transcript of hearings on motions to dismiss complaint and on order to show cause re restraint, filed.

5-17-50 Designation of Contents of Record on Appeal, filed.

5-17-50 Points relied upon by defendant, filed.

5-17-50 Agreed Statement of Facts, filed.

5-23-50 Bond for Security for Costs, filed.

In United States District Court

Complaint

George Stefanelli, Plaintiff, respectfully represents to this Honorable Court as follows:

1. This Court has jurisdiction by virtue of Title 28 United States Code Annotated, Section 1343, and by reason of the nature of this cause of action.

2. Plaintiff is a citizen of the United States and resides at 88 Tremont Avenue, Newark, New Jersey and brings this action in his own right.

3. Defendant, Duane E. Minard, Jr., is a citizen of the United States and is sued in his official capacity as Prosecutor for Essex County, New Jersey.

4. Defendant John Shultz, is a citizen of the United States and is sued in his official capacity as Prosecutor's Detective of Essex County, New Jersey.

[fol. 3] 5. William Anderson is a citizen of the United States and is sued in his official capacity as Prosecutor's Detective of Essex County, of New Jersey.

6. Frank O'Neill is a citizen of the United States and is sued in his official capacity as Chief of Police of the City of Newark, County of Essex and State of New Jersey.

7. Lawrence W. Sheridan, is a citizen of the United States, and is sued in his official capacity as a police officer of the City of Newark, County of Essex and State of New Jersey.

8. Kenneth Lacey, is a citizen of the United States, and is sued in his official capacity as a police officer of the City of Newark, County of Essex and State of New Jersey.

9. On or about December 6th, 1949, the plaintiff was residing at 88 Tremont Avenue, Newark, New Jersey with his wife and child and occupied the first floor of said premises. On that day the defendants, John Shultz, William Anderson, Lawrence W. Sheridan and Kenneth Lacey under the color of their office as police officers did break and enter into the home of the plaintiff, without his consent, knowledge or approval.

10. Without the consent, acquiescence or approval of the plaintiff, the defendants John Shultz and William Anderson, Lawrence W. Sheridan and Kenneth Lacey did unlawfully search all of the rooms, furniture and things of the plaintiff and unlawfully took and seized papers, paraphe-nalia, and other things, the property of the plaintiff, pertaining to the wagering and booking of horses which said police officers claimed to be in violation of the Statutes of New Jersey viz: New Jersey Revised Statutes Title 2:135-3.

11. That said defendant police officers by virtue of their color of office seized all of said papers, paraphe-nalia, and [fol. 4] things with the intent thereby to use the same as evidence against the plaintiff in the prosecution of criminal charges made by them for violation of the aforesaid statute pertaining to what is commonly called Bookmaking.

12. Plaintiff was admitted to bail and subsequently was indicted by the Essex County Grand Jury for unlawful bookmaking and upon which indictment he was arraigned and to which he pleaded not guilty.

13. The defendant, Duane E. Minard, Jr., by virtue of his office as Prosecutor for Essex County is charged with the duty of prosecuting the plaintiff on said indictment

and presenting the evidence unlawfully seized by the said police officers in order to sustain said indictment.

14. That the defendants, John Shultz and William Anderson are Detectives attached to the office of the Prosecutor for Essex County; and under the direction and supervision of Duane E. Minard, Jr., as aforesaid, and the defendants, Lawrence W. Sheridan and Kenneth Lacey are under the direction and supervision of the defendant, Frank O'Neill as Chief of Police of the City of Newark, Essex County of New Jersey.

15. That the aforesaid property and evidence unlawfully seized by the aforesaid police officers will be used against the plaintiff in the prosecution of said indictment to the irreparable damage of the plaintiff.

16. That the defendants by their course of conduct have violated the rights of the plaintiff under the Fourth Amendment to the United States Constitution and have further violated his rights under the laws of the United States, and more particularly, what is commonly called, "Civil Rights Law Title 8, Section 43", wherein it is provided that no person shall be deprived of any rights, privileges, and immunities secured by the Constitution of the United States [fol. 5] by any person who acts under the color of any statute, ordinance, custom or usage of any State or Territory, etc.

17. That the defendants John Shultz and William Anderson acted under the authority of the defendant Duane E. Minard, Jr., as Prosecutor for Essex County; and the defendants Lawrence W. Sheridan and Kenneth Lacey acted under the authority of the defendant Frank O'Neill, Chief of Police of the City of Newark, County of Essex, New Jersey.

18. That irreparable harm and injury will be caused to the plaintiff if the evidence seized by the aforesaid defendants is not suppressed and returned to the plaintiff and no other remedy is adequate to the plaintiff.

19. Plaintiff does not have an adequate remedy in the State Courts of New Jersey and invokes the jurisdiction of this Court to protect the immunities and privileges granted to him by the Constitution of the United States and the laws of the United States of America.

Wherefore, Plaintiff prays judgment of the Court as follows:

A. That a preliminary injunction, restraining and enjoining, be issued Duane E. Minard, Jr., in his official capacity as Prosecutor for Essex County, New Jersey, Prosecutor's Detective John Shultz, Prosecutor's Detective William Anderson, Chief of Police, Frank O'Neill, Police Officers Lawrence W. Sheridan and Kenneth Lacey and such other person or persons acting under and by the authority of Duane E. Minard, Jr., and Frank O'Neill and all other persons who act in concert with them or participation with them from using the seized property of the plaintiff, pending the determination of allegations of this Complaint and from further proceedings in connection with the prose- [fol. 6] cution of the aforesaid indictment, by the use of the seized property of the plaintiff.

B. That the evidence unlawfully obtained by the defendants be suppressed and returned to the plaintiff.

C. That an Order to Show Cause be made by this Honorable Court requiring the defendants to show cause as to why a preliminary restraint and injunction should not be made against the defendants against the use against plaintiff, as evidence of all of the property unlawfully seized by the defendants at any trial or hearing against the plaintiff.

D. That a judgment be ordered restraining and enjoining all of the defendants from using as evidence against the plaintiff all of the property unlawfully taken from the plaintiff together with all leads and information therefrom at any trial or hearing intended to be prosecuted by the defendants against the plaintiff.

E. That all of the property taken and seized from the plaintiff by the defendants be returned to him and the use thereof as evidence be suppressed at any trial or hearing prosecuted by the defendants in the State Courts of New Jersey.

Anthony A. Calandra, Attorney for Plaintiff.

[fol. 7] AFFIDAVIT OF GEORGE STEFANELLI

STATE OF NEW JERSEY,
County of Essex, ss.:

GEORGE STEFANELLI, of full age, being duly sworn, according to law on his oath deposes and says:

1. I am the plaintiff in the foregoing cause of action.

2. On December 6th, 1949, while I was in my home on the first floor of premises No. 88 Tremont Avenue, Newark, New Jersey, my kitchen door was broken into by Prosecutor's Detectives John Shultz and William Anderson, and by Newark Police Officers Lawrence W. Sheridan and Kenneth Lacey, and all of said police officers thereby gained entrance into my apartment without my consent and approval. All of said officers without my consent and approval searched all of my rooms and furnishings and in one room took certain papers, paraphernalia and things, all of which pertained to the wagering on race horses and bookmaking. No warrant for my arrest or for the search of my home was read or presented to me by any of the officers. I was placed under arrest, released on bond and subsequently indicted by the Essex County Grand Jury upon a charge of bookmaking in violation of the laws of the State of New Jersey. I have pleaded not guilty to this charge and trial has been fixed by Duane E. Minard, Jr. Prosecutor of Essex County, in the Essex County Court on April 17th, 1950.

3. The police officers of the City of Newark, New Jersey, acted by and with the authority of Frank O'Neill, Chief of Police of the City of Newark, New Jersey, and Prosecutor's Detectives Shultz and Anderson acted by and with the authority vested in them by color of their office, as did the local police officers, as aforesaid.

[fol. 8] 4. The said Duane E. Minard, Jr. as Prosecutor for Essex County, intends to use all of my property which was unlawfully seized by the aforesaid law enforcement officers as evidence against me on the trial of the aforesaid indictment, and each of the aforesaid officers will produce and present as evidence against me all of my property consisting of papers, paraphernalia and things pertaining to the wagering on horse races and bookmaking in order to sustain the charge against me by the indictment aforesaid.

5. My constitutional rights were violated by the actions and conduct of the said officers and irreparable damage will

be caused to me unless the evidence is suppressed against me and my property returned. The penalty on conviction for bookmaking is not less than one year or more than five years imprisonment or a fine of not less than $1,000.00 or more than $5,000.00.

George Stefanelli.

Sworn and subscribed to before me this 10th day of April, A. D. 1950. Nicholas V. Calandra, a Notary Public of New Jersey.

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE

Filed April 11, 1950

Now comes the plaintiff, George Stefanelli, who has filed a Complaint in this Court wherein it is claimed that the defendants, John Shultz, Prosecutor's Detective for Essex County, New Jersey, William Anderson, Prosecutor's Detective for Essex County, New Jersey, Frank O'Neill, Chief of Police of the City of Newark, Essex County, New Jersey, Lawrence W. Sheridan, a police officer of the City of Newark, New Jersey and Kenneth Lacey, a police officer of the City of Newark, New Jersey, by virtue of their office and by the color thereof are prosecuting the plaintiff upon an indictment found by the Essex County Grand Jury for a crime commonly designated as Bookmaking in violation of New Jersey Revised Statutes Title 2:135-3;

And it appearing from said Complaint filed by the plaintiff that the defendants, John Shultz, William Anderson, Lawrence W. Sheridan and Kenneth Lacey, by virtue of their color of office and under the direction and authority of their superiors, Duane E. Minard, Jr., as Prosecutor for Essex County, New Jersey and Frank O'Neill, as Chief of Police of the City of Newark, New Jersey, County of Essex, did break and enter into the home of the plaintiff, without his consent and approval and therein made a search of plaintiff's home, without his consent and approval, and seized therein certain papers, paraphα-nalia and things pertaining to the operation of bookmaking, without his consent and approval, in violation of the constituti-nal rights of the

plaintiff; and that said property is intended to be used by the defendants as evidence against the plaintiff in the trial of the aforesaid indictment in the Essex County Court;

[fol. 10] And it appearing from said Complaint that unless the relief prayed for by plaintiff is granted, that he will suffer irreparable harm and injury, and there being no other adequate remedy available to plaintiff;

And it appearing that this Court has jurisdiction in the premises by virtue of Title 28 of the United States Code Annotated Section 1343;

It is, therefore, on this 11th day of April, 1950, adjudged and ordered, that the defendants Duane E. Minard, Jr., Prosecutor for Essex County, John Shultz, Prosecutor's Detective for Essex County, New Jersey, William Anderson, Prosecutor's Detective for Essex County, New Jersey, Frank O'Neill, Chief of Police of the City of Newark, New Jersey, Lawrence W. Sheridan, Police Officer of the City of Newark, New Jersey and Kenneth Lacey, Police Officer of the City of Newark, New Jersey, show cause before this Court on Monday, the 17th day of April 1950, why they should not be restrained and enjoined from using the property of the plaintiff and seized by said officers as evidence against plaintiff at any trial or hearing, by the preliminary injunction of this Court; and to further show cause why the evidence seized by said officers by virtue of their color of office should not be suppressed and returned to the plaintiff, and why the judgment prayed for in the Complaint should not be granted.

And it is further ordered that a copy of the Complaint together with a copy of this order be served upon each of the defendants within 1 day from the date of this order.

Thos. F. Meaney, U. S. D. J.

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9 [fol. 11] In United States District Court

Motion to Dismiss Complaint

The defendants Duane E. Minard, Jr., John Schultz, and William Anderson moved the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the said defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction in the premises.

C. William Caruso, Attorney for Defendants, Duane E. Minard, Jr., John Schultz and William Anderson, Essex County Prosecutor's Office, Court House, Newark, New Jersey.

[fol. 12] In United States District Court

Motion to Dismiss Complaint

The defendants Frank O'Neill, Lawrence W. Sheridan and Kenneth Lacey move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the said defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction in the premises.

Charles Handler, Corporation Counsel Attorney for Defendants, Frank O'Neill, Lawrence W. Sheridan and Kenneth Lacey, Law Department, City Hall, Newark, New Jersey.

[fol. 13] In United States District Court

Order Dismissing Complaint Etc.

This matter coming on to be heard in the presence of Anthony A. Calandra, Esq., Attorney for plaintiff, George Stefanelli, and C. William Caruso, Esq., Attorney for defendants, Duane E. Minard, Jr., Prosecutor for Essex County, John Schultz, Prosecutor's Detective for Essex County, and William Anderson, Prosecutor's Detective for Essex County, and Vincent J. Casale, Esq., of counsel with Charles Handler, Esq., Attorney for defendants, Frank O'Neill, Chief of Police, City of Newark, Lawrence W. Sheridan, Police Officer, City of Newark, and Kenneth Lacey, Police Officer, City of Newark, upon the complaint, order to show cause and motions for dismissal of said complaint, and good cause being shown therefor, and after

argument of counsel thereon and it appearing that the plaintiff has not exhausted his remedies under state law,

It is on this 26th day of April, 1950,

Ordered, that the complaint filed in the above entitled cause and the rule to show cause heretofore issued be and the same are hereby dismissed.

Thomas F. Meaney, U. S. D. J.

Consent is hereby given as to form:

Anthony A. Calandra, Attorney for Plaintiff, George Stefanelli. C. William Caruso, Attorney for Defendants, Duane E. Minard, Jr., John Schultz and William Anderson. Charles Handler, Attorney for Defendants, Frank O'Neill, Lawrence W. Sheridan and Kenneth Lacey.

[fol. 14] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Name and address of Appellant:

George Stefanelli, resides at 88 Tremont Avenue, Newark, New Jersey.

Name and address of Appellant's Attorney:

Anthony A. Calandra, Esquire,
31 Clinton Street, Newark, New Jersey.

Judgment appealed from:

Appellant appeals to the United States Court of Appeals for the Third Circuit, from the Judgment and Order made in the United States District Court for the District of New Jersey, dismissing the Complaint filed by the Appellant and Order to Show Cause issued by the said District Court. Appellant filed a Complaint in equity by virtue of the original jurisdiction vested in the United States District Court seeking to suppress evidence unlawfully and unreasonably seized by police officers of the City of Newark, New Jersey, from the appellant without a warrant for the arrest of the appellant or a search warrant; and to enjoin the said police officers and prosecuting officials

from using said evidence at any trial or hearing of criminal proceedings now pending against appellant in the State Courts of New Jersey.

George Stefanelli. Anthony A. Calandra, Attorney for and of Counsel with Appellant.

To: Hon C. William Caruso, Attorney for Duane Minard, Jr., Prosecutor for Essex County, John Shultz and William Anderson, Court House, Newark, New Jersey.

To: Hon. Charles Handler, Attorney for Frank O'Neill, Chief of Police and all other defendants, City Hall, Newark, New Jersey.

[fol. 15]. In United States District Court

Agreed Statement of Facts

The attorneys for the respective parties to these proceedings stipulate that the following facts are agreed upon and submitted for consideration in the appeal now pending in this cause in the United States Court of Appeals for the Third Circuit, viz:

1. That on December 6th, 1949, at about 2:45 P. M. Newark Police Officers, Lawrence Sheridan and Kenneth Lacey, accompanied by Prosecutor's Detectives John Schultz and William Anderson, in the performance of their official duties, went to appellant's residence, 88 Tremont Avenue, Newark, New Jersey.

2. Said officers at that time had no warrant for the arrest of the appellant.

3. Said officers at that time had no search warrant for the search of the appellant's residence and to make a seizure therein.

4. That said officers gained entrance into the residence of the appellant, without the consent of the appellant.

5. Appellant was present in his own apartment on the first floor of the premises in question, and after the entry by the police officers made no resistance to the search and seizure.

6. Papers, paraphernalia and other things the property of appellant, pertaining to wagering and booking of bets on horses in violation of New Jersey Revised Statutes 2:135-3, relating to the crime of bookmaking were seized by said officers.

7. The matters and things taken by the said police officers were concededly evidential *per se* and, therefore, admissible in evidence under the law of the State of New Jersey in a prosecution for the crime of bookmaking.

[fol. 16] 8. Appellant was arrested on said occasion on December 6th, 1949, arraigned before a local magistrate on December 7th, 1949, upon a formal complaint made by one of the arresting officers, charging appellant with bookmaking on December 6th, 1949, and a warrant for the arrest of appellant was issued and executed on December 7th, 1949, by said police officers.

9. Appellant pleaded not guilty to the charge and was held to await the action of the Essex County Grand Jury.

10. Appellant was indicted by the Essex County Grand Jury for the crime of bookmaking in violation of the New Jersey Statute R. S. 2:135-3, to which accusation he pleaded not guilty.

11. That the fruits of the search and seizure made in appellant's residence on December 6th, 1949, will be used as evidence by the appellees at the trial of the appellant in the Essex County Court.

12. Appellant took no proceedings in the Essex County Court to suppress the evidence he claims to have been unlawfully seized in violation of his constitutional rights.

13. Appellant's Complaint filed in the United States District Court sought to invoke the jurisdiction of said Court to enjoin the appellees from the use of the property taken from his residence as evidence, and that the same be suppressed and returned to appellant, claiming violation of the Fourth Amendment to the United States Constitution and U. S. C. A. Title 8, section 43.

[fol. 17] 14. The United States District Court for the District of New Jersey dismissed the Complaint and the Order to Show Cause.

Anthony A. Calandra, Attorney for Appellant. C. William Caruso, Attorney for Appellees, Duane E. Minard, Jr., etc., John Schultz, etc., and William Anderson. Charles Handler, Attorney for Appellees, Frank O'Neill, etc., Lawrence Sheridan and Kenneth, Lacey, etc.

[fol. 18] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

It is hereby stipulated and agreed by and between the attorneys for the parties to the appeal now pending in this cause, in the United States Court of Appeals for the Third Circuit that the Record on Appeal shall consist of the following:

1. Complaint filed by appellant in the United States District Court for the District of New Jersey.
2. Order to Show Cause issued by the United States District Court for relief pending the proceedings on the Complaint.
3. Motions by all appellees to dismiss the Complaint.
4. Agreed Statement of Facts.
5. Judgment, (entitled Order) dismissing the Complaint and Order to Show Cause made on April 26th, 1950, by the Honorable Thomas F. Meaney, Judge of the United States District Court for the District of New Jersey.
6. Notice of Appeal.
7. Points relied upon by Appellant.

Anthony A. Calandra, Attorney for Appellant.
C. William Caruso, Attorney for Appellees, Duane E. Minard, Jr., etc.; John Shultz, etc.; and William Anderson, etc. Charles Handler, Attorney for Appellees, Frank O'Neill, etc.; Lawrence E. Sheridan, etc., and Kenneth Lacey, etc.

[fol. 19] IN UNITED STATES DISTRICT COURT

POINTS RELIED UPON BY APPELLANT

George Stefanelli, the appellant, will rely upon the following points in the appeal now pending in the United States Court of Appeals for the Third Circuit:

1. That the United States District Court for the District of New Jersey, has original jurisdiction to grant the relief prayed for in the Complaint.
2. That the constitutional rights of the appellant guaranteed him by the Fourth and Fifth Amendments of the Constitution of the United States of America were violated.

3. That the constitutional rights of the appellant are fundamental and basic rights and are vested rights over which the United States District Court for the District of New Jersey must invoke the protections guaranteed by the Fourth and Fifth Amendments of the Constitution of the United States of America, and other amendments, to the extent prayed for, and grant the relief requested by the appellant as charged in his complaint.

4. That the denial of the relief requested by the appellant will cause appellant irreparable injury.

5. Appellant is not required to exhaust his remedies, if any he may have, in the State Courts of New Jersey, before invoking the processes of the Federal Courts for the relief which he seeks.

6. That the appellant has no adequate remedy in any of the State Courts of New Jersey, because all appellate courts of said state have consistently held that the fruits of an unlawful search and seizure, if evidential *per se*, are admissible in evidence against the accused.

Respectfully, Anthony A. Calandra, Attorney for Appellant.

[fol. 20] In United States District Court

Docket Entries

4-19-50. Complaint filed.

4-19-50. Order to Show Cause re: restraint filed (Meaney) (ret. 4-24-50).

4-19-50. Summons issued.

4-19-50. Notice of Allocation (Newark) filed.

4-21-50. Notice of motion to dismiss complaint with acknowledgment of service filed (ret. 4-24-50).

4-26-50. Summons returned served on all defendants on 4-19-50 together with order to show cause filed.

4-26-50. Hearing on application for preliminary injunction. Ordered application denied. (Meaney) (4-24-50).

4-26-50. Ordered motion to dismiss complaint, granted. Order to be submitted. (Meaney) (4-24-50).

4-26-50. Order of dismissal with costs, in favor of the defendants, Duane E. Minard, Jr., Frank O'Neill, George E. Kaas, William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Amidio and Albert Franks and against

the plaintiffs, Jerry Malanga, Joseph Maglione and Frank D'Innocenzio, filed. (Meaney) (Notice mailed).

4-26-50. Statement of defendant's costs, taxed at $20.00 filed.

4-26-50. Notice of Appeal filed.

4-26-50. Copies forwarded to Wm. Caruso, Esq., Chas. Handler, Esq., and Clerk, U. S. C. C. A.

5-17-50. Transcript of hearings on application for preliminary injunction and to dismiss complaint, filed.

5-17-50. Designation of Contents of Record on Appeal, filed.

5-17-50. Agreed Statement of Facts, filed.

5-17-50. Points relied upon by Appellants, filed.

5-23-50. Bond for Security for Costs, filed.

[fol. 21] IN UNITED STATES DISTRICT COURT

COMPLAINT

Jerry Malanga, Joseph Maglione, and Frank D'Innocenzio, plaintiffs, respectfully represent to this Honorable Court as follows:

1. This Court has jurisdiction by virtue of Title 28 United States Code Annotated, Section 1343, and by reason of the nature of this cause of action.

2. Plaintiff, Jerry Malanga is a citizen of the United States and resides at 68 High Street, Newark, New Jersey and brings this action in his own right.

3. Plaintiff, Joseph Maglione is a citizen of the United States and resides at 38 Mt. Prospect Avenue, Belleville, New Jersey and brings this action in his own right.

4. Plaintiff, Frank D'Innocenzio is a citizen of the United States and resides at 73 Stone Street, Newark, New Jersey and brings this action in his own right.

5. Frank O'Neill is a citizen of the United States and is sued in his official capacity as Chief of Police of the City of Newark, County of Essex and State of New Jersey.

6. Duane E. Minard, Jr., is a citizen of the United States and is sued in his official capacity as Prosecutor for Essex County, New Jersey.

7. George E. Kaas is a citizen of the United States and is sued in his official capacity as Police Commissioner of the City of Newark, New Jersey.

8. William Hull is a citizen of the United States and is sued in his official capacity as Police Detective of the City of Newark, New Jersey.

9. James Clark is a citizen of the United States and is sued in his official capacity as Police Detective of the City of Newark, New Jersey.

[fol. 22] 10. Clifford Heiss is a citizen of the United States and is sued in his official capacity as Police Detective of the City of Newark, New Jersey.

11. John Walter is a citizen of the United States and is sued in his official capacity as Police Detective of the City of Newark, New Jersey.

12. Anthony D'Emidio is a citizen of the United States and is sued in his official capacity as Police Detective of the City of Newark, New Jersey.

13. Albert Franks is a citizen of the United States and is sued in his official capacity as Police Detective of the City of Newark, New Jersey.

14. On or about April 5th, 1950 the plaintiffs occupied that attic rooms at premises 201 No. 13th Street, Newark, New Jersey. On that day the defendants William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Emidio and Albert Franks, under the color of their office as Police Detectives did break and enter into the rooms occupied by the plaintiffs, without their consent, knowledge or approval.

15. Without the consent, acquiescence or approval of the plaintiffs, the said defendants, William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Emidio and Albert Franks did unlawfully search the premises and property of the plaintiffs and unlawfully took and seized papers, paraphe-nalia and other things the property of the plaintiffs all of which pertained to the wagering and booking of horses which said Police Detectives claimed to be in violation of the Statutes of New Jersey Revised Statutes Title 2:135-3.

16. That the defendants by virtue of the color of their office seized all papers, paraphe-nalia and things without a search warrant or a warrant for the arrest of the plaintiffs [fol. 23] with the intent thereby to use the same as evidence against the plaintiffs in the prosecution of criminal charges made by said defendants charging a violation of the aforesaid Statutes pertaining to what is commonly called Book-

making. That in addition thereto the said defendants caused to be made a complaint against the plaintiffs for Malicious Mischief, charging that the plaintiffs did on this same day maliciously burn the property of another.

17. Plaintiffs were admitted to bail and held for a hearing on the complaints made against them by the defendants in the Municipal Court of the City of Newark, New Jersey, Part 2, on charges of Bookmaking and Malicious Mischief under the Laws of the State of New Jersey.

18. Plaintiffs were granted a hearing in said Municipal Court in the City of Newark and were held to await the action of the Essex County Grand Jury. Plaintiffs pleaded not guilty to each of said charges in said Municipal Court. The defendant, Duane E. Minard, Jr., by virtue of his office as Prosecutor for Essex County is charged with the duty of bringing the evidence illegally obtained by the other defendants to the Essex County Grand Jury to seek an indictment and prosecute the plaintiffs on said indictment.

19. That the defendants, Police Detectives, William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Emidio, and Albert Franks, acted under the authority of Frank O'Neill, as Chief of Police of the City of Newark and under the authority of the defendant, George E. Kaas as Police Commissioner of the City of Newark.

20. That the aforesaid property and evidence unlawfully seized by the defendants, as aforesaid, will be used against the plaintiffs to the irreparable damage of the plaintiffs.

[fol. 24] 21. That the defendants by their course of conduct have violated the rights of the plaintiffs under the Fourth Amendment to the United States Constitution and have further violated their rights under the laws of the United States, and more particularly, what is commonly called, "Civil Rights Law Title 8, Section 43", wherein it is provided that no person shall be deprived of any rights, privileges, and immunities secured by the Constitution of the United States by any person who acts under the color of any statute, ordinance, custom or usage of any State or Territory, etc.

22. That irreparable harm and injury will be caused to the plaintiffs if the evidence seized by the aforesaid defendants is not suppressed and returned to the plaintiffs and no other remedy is adequate to the plaintiffs.

23. Plaintiffs do not have an adequate remedy in the State Courts of New Jersey and invoke the jurisdiction of this Court to protect the immunities and privileges granted to him by the Constitution of the United States and the laws of the United States of America.

Wherefore, Plaintiffs pray judgment of the Court as follows:

A. That a preliminary injunction be issued restraining and enjoining, Duane E. Minard, Jr., in his official capacity as Prosecutor for Essex County, New Jersey, Frank O'Neill, Chief of Police of the City of Newark, George S. Kaas Police Commissioner of the City of Newark, Police Detectives William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Emidio and Albert Franks, and such other person or persons acting under and by the authority of Duane E. Minard, Jr., and Frank O'Neill and all other persons who act in concert with them or participation with them from [fol. 25] using the seized property of the plaintiffs, pending the determination of allegations of this Complaint and from further proceedings in connection with the prosecution of the aforesaid indictment, by the use of the seized property of the plaintiffs.

B. That the evidence unlawfully obtained by the defendants be suppressed and returned to the plaintiffs.

C. That an Order to Show Cause be made by this Honorable Court requiring the defendants to show cause as to why a preliminary restraint and injunction should not be made against the defendants against the use against plaintiffs, as evidence of all of the property unlawfully seized by the defendants at any trial or hearing against the plaintiffs.

D. That a judgment be ordered restraining and enjoining all of the defendants from using as evidence against the plaintiffs all of the property unlawfully taken from the plaintiffs together with all leads and information therefrom at any trial or hearing intended to be prosecuted by the defendants against the plaintiffs.

E. That all of the property taken and seized from the plaintiffs by the defendants be returned to them and the use thereof as evidence be suppressed

at any trial or hearing prosecuted by the defendants in the State Courts of New Jersey.

Anthony A. Calandra, Attorney for Plaintiffs.

[fol. 26] AFFIDAVIT OF FRANK D'INNOCENZIO, JOSEPH MAGLIONE AND JERRY MALANGA

STATE OF NEW JERSEY,
County of Essex, ss:

Frank D'Innocenzio, Joseph Maglione and Jerry Malanga, all of full age being severally sworn according to law on their oaths depose and say:

1. We are the plaintiffs in the foregoing cause of action.

2. On April 5, 1950, we occupied the attic rooms of premises 201 North 13th Street, Newark, New Jersey. We had for our use and occupation two rooms and a bathroom. There was a door from the hallway to each of the rooms occupied by us. The doors were locked and made secure against entry by the use of a heavy piece of wood on hinges, the purpose being to prevent anyone from forcibly entering these rooms. On the afternoon of said day Police Detectives broke down the doors and gained entry into the rooms without our consent and approval. They did not present to us a warrant for our arrest or a search warrant to search our rooms. Police Detectives William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Emidio and Albert Franks, without our consent and approval took and seized papers, paraphernalia, telephones, and other things which pertained to the operation of a bookmaking business and the wagering on horse races with intent to use this evidence against us to prosecute us on complaints made by said Police Detectives charging us with Bookmaking in violation of the Laws of New Jersey. Some papers were being burned in the bathtub and the Police Detectives likewise charged us with Malicious Mischief. We have pleaded not guilty to these charges in the Municipal Court of the City of Newark, Part 2 and after a hearing granted us on the complaints, we were held to await the action of the Essex County Grand Jury.

[fol. 27] The Police Detectives, William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Emidio,

Albert Franks acted by and with the authority of Frank O'Neill, Chief of Police of the City of Newark, New Jersey and by and with the authority of George E. Kass, Police Commissioner of the City of Newark.

That the evidence which was taken from us and pertaining to Bookmaking will be used by Duane E. Minard, Jr., Prosecutor for Essex County, New Jersey, to obtain an indictment against us and as well as to bring us to trial on said indictment and use said evidence for the purpose of convicting us.

Our Constitutional Rights were violated by the acts and conduct of the said Police Detectives and irreparable damage will be caused to us unless the evidence is suppressed against us and our papers returned to us. The penalty on the conviction of Bookmaking is not less than one year or more than five years imprisonment and a fine of not less than $1,000.00 or more than $5,000.00.

As to the penalty for Malicious Mischief upon conviction the Court could impose a sentence up to three years and a fine of up to $1,000.00.

Frank D'Innocenzio, Joseph Maglione, Jerry Malanga.

Sworn and subscribed to before me this 19th day of April, 1950. Constance Forcella, Notary Public of New Jersey. My commission expires Feb. 17, 1954.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE

Now comes the plaintiffs, Jerry Malagna, Joseph Maglione and Frank D'Innocenzio, who have filed a Complaint in this Court wherein it is claimed that the defendants, Duane E. Minard, Jr., Prosecutor for Essex County, New Jersey, Frank O'Neill, Chief of Police of the City of Newark, New Jersey, George E. Kaas, Police Commissioner of the City of Newark, New Jersey, Police Detective William Hull of the City of Newark, Police Detective James Clark of the City of Newark, Police Detective Clifford Heiss of the City of Newark, Police Detective John Walter of the City of Newark, Police Detective Anthony D'Emidio of the

City of Newark and Police Detective Albert Franks of the City of Newark, New Jersey, by virtue of their office and by the color thereof are prosecuting the plaintiffs upon an indictment found by the Essex County Grand Jury for a crime commonly designated as Bookmaking in violation of New Jersey Revised Statutes Title 2:135-3:

And it appearing from said Complaint filed by the plaintiffs that the defendants William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Emidio and Albert Franks by virtue of their color of office and under the direction and authority of their superiors, Duane E. Minard, Jr., as Prosecutor for Essex County, Frank O'Neill as Chief of Police of the City of Newark, New Jersey, County of Essex, did break and enter into the place of the plaintiffs, without their consent and approval and therein made a search of plaintiffs' place, without their consent and approval, and seized therein certain papers, paraphernalia and things pertaining to the operation of bookmaking, without their consent and approval, in violation of the constitutional rights of the plaintiffs; and that said property is intended to be used by the defendants as evidence against the plaintiffs in the trial of the aforesaid indictment in the Essex County Court;

[fol. 29] And it appearing from said Complaint that unless the relief prayed for by plaintiffs is granted, that they will suffer irreparable harm and injury, and there being no other adequate remedy available to plaintiffs;

And it appearing that this Court has jurisdiction in the premises by virtue of Title 20 of the United States Code Annotated Section 1343:

It is therefore, on this 19th day of April, 1950, adjudged and ordered, that the defendants Duane E. Minard, Jr., Prosecutor for Essex County, Frank O'Neill, Chief of Police of the City of Newark, George H. Kaas, Police Commissioner of the City of Newark, William Hull, Police Detective of the City of Newark, James Clark, Police Detective of the City of Newark, Clifford Heiss, Police Detective of the City of Newark, John Walter, Police Detective of the City of Newark, Anthony D'Emidio, Police Detective of the City of Newark and Albert Franks, Police Detective of the City of Newark, New Jersey, show cause before this Court on Monday the 24th day of April 1950, why they should not be restrained and enjoined from using the property of the plaintiffs and seized by said officers as evidence

against plaintiffs at any trial or hearing, by the preliminary injunction of this Court; and to further show cause why the evidence seized by said Police Detectives by virtue of their color of office should not be suppressed and returned to the plaintiffs, and why the judgment prayed for in the Complaint should not be granted.

And it is further ordered that a copy of the Complaint together with a copy of this order be served upon each of the defendants within 1 day from the date of this order.

Thomas F. Meaney, U. S. D. J.

[fol. 30] In United States District Court

Motion to Dismiss Complaint

The above-named defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the said defendant upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction in the premises.

C. William Caruso, Attorney for Defendant, Duane E. Minard, Jr. Charles Handler, Attorney for All Other Defendants.

In United States District Court

Order Dismissing Complaint etc.

This matter coming on to be heard in the presence of Anthony A. Calandra, Esq., Attorney for plaintiffs, Jerry Malanga, Joseph Maglione and Frank D'Innocenzio, and C. William Caruso, Esq., Attorney for defendant, Duane E. Minard, Jr., Prosecutor for Essex County, New Jersey, and Vincent J. Casale, Esq., of counsel with Charles Handler, Esq., Attorney for defendants, Frank O'Neill, Chief of Police of the City of Newark, New Jersey, George E. Kaas, Police Commissioner of the City of Newark, William Hull, Police Detective of the City of Newark, James Clark,

Police Detective of the City of Newark, Clifford Heiss, Police Detective of the City of Newark, John Walter, Police Detective of the City of Newark, Anthony D'Amidio, Police Detective of the City of Newark and Albert Franks, Police Detective of the City of Newark, upon the complaint, order to show cause and motions for dismissal of said com-[fol. 31] plaint, and good cause being shown therefor, and after argument of counsel thereon it appearing that the plaintiffs have not exhausted their remedies under state law.

It is on this 26th day of April, 1950

Ordered, that the complaint filed in the above entitled cause and the rule to show cause heretofore issued be and the same are hereby dismissed.

Thomas F. Meaney, U. S. D. J.

Consent is hereby given as to form:

Anthony A. Calandra, Attorney for Plaintiffs, Jerry Malanga, Joseph Maglione and Frank D'Innocenzio. C. William Caruso, Attorney for Defendant, Duane E. Minard, Jr. Charles Handler, Attorney for Defendants, Frank O'Neill, George E. Kaas, William Hull, James Clark, Clifford Heiss, John Walter, Anthony D'Amidio and Albert Franks.

[fol. 32] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Name and address of Appellants:

Jerry Malanga, resides at 69 Hight Street, Newark, New Jersey, Joseph Maglione, resides at 38 Mt. Prospect Avenue, Belleville, New Jersey and Frank D'Innocenzio resides at 73 Stone Street, Newark, New Jersey.

Name and address of Appellants' Attorney:

Anthony A. Calandra, Esquire, 31 Clinton Street, Newark, New Jersey.

Judgment appealed from:

Appellants appeal to the United States Court of Appeals for the Third Circuit, from the Judgment and Order made

in the United States District Court for the District of New Jersey, dismissing the Complaint filed by the Appellants and Order to Show Cause issued by the said District Court. Appellants filed a Complaint in equity by virtue of the original jurisdiction vested in the United States District Court seeking to suppress evidence unlawfully and unreasonably seized by police officers of the City of Newark, New Jersey from the appellants without a warrant for the arrest of the appellants or a search warrant; and to enjoin the said police officers and prosecuting officials from using said evidence at any trial or hearing or criminal proceed-
[fol. 33] ings now pending against appellants in the State Courts of New Jersey.

Jerry Malanga, Joseph Maglione, Frank D'Innocenzio; Anthony A. Calandra, Attorney for and of Counsel with Appellants.

To: Hon. C. William Caruso, Attorney for Duane E. Minard, Jr., Prosecutor for Essex County Court House, Newark, New Jersey.

To: Hon. Charles Handler, Vincent J. Casale, Esquire, attorneys for Frank O'Neill, Chief of Police and all other defendants, City Hall, Newark, New Jersey.

[fol. 34] IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACTS

The attorneys for the respective parties to these proceedings stipulate that the following facts are agreed upon and submitted for consideration in the appeal now pending in this cause, in the United States Court of Appeals for the third Circuit, viz:

1. That on April 5th, 1950, at about 2:00 P. M. Newark Police Officers, William Hull, James Clark, Clifford Heiss, and John Walter, in the performance of their official duties, went to the third floor attic rooms at 201 North 13th Street, Newark, New Jersey, and occupied by the appellants.

2. Said police officers at that time had no warrant for the arrest of the appellants.

3. Said police officers at that time had no search warrant for the search of the appellants' premises and to make a seizure therein.

4. That said police officers gained entrance into said premises without the consent of the appellants.

5. Appellants were all present in the said attic rooms at the time of the entry by said police officers and made no resistance to the search and seizure.

6. Papers, paraphernalia and other things, the property of the appellants, pertaining to wagering and booking bets on horses in violation of New Jersey Revised Statutes 2:135-3, relating to the crime of bookmaking were seized by said officers.

7. The matters and things taken by the said police officers were concededly evidential *per se* and, therefore, admissible in evidence under the law of the State of New Jersey in a prosecution for the crime of bookmaking.

8. Appellants were arrested on said occasion on April 5th, 1950, arraigned before a local magistrate on April 6th, 1950, upon a formal complaint made by one of the arresting officers, charging appellants with bookmaking on April 5th, [fol. 35] 1950, and a warrant for the arrest of appellants was issued and executed on April 6th, 1950, by said arresting officers.

9. Appellants, at the preliminary hearing before the local police magistrate pleaded not guilty; the evidence seized by the police officers without a search warrant was admitted in evidence over the objection of the appellants made on constitutional grounds; thereupon, appellants were held to await the action of the Essex County Grand Jury, which body has not as yet heard the evidence in this cause.

10. That the fruits of the search and seizure made of appellants' property in the premises, will be used in evidence before the Grand Jury and will also be used at the trial of appellants upon any indictment returned.

11. Appellants have taken no proceedings in the State Courts to suppress the evidence which they claim to have been unlawfully seized in violation of their constitutional rights.

12. Appellants' Complaint filed in the United States District Court sought to invoke the jurisdiction of said Court to enjoin the appellees from the use of the property taken from his residence as evidence, and that the same be suppressed and returned to appellant, claiming violation of the Fourth Amendment of the United States Constitution and U. S. C. A. Title 8, section 43.

13. The United States District Court for the District of New Jersey dismissed the Complaint and the Order to Show Cause.

Anthony A. Calandra, Attorney for Appellants. C. William Caruso, Attorney for Appellee, Duane E. Minard, Jr., etc. Charles Handler, Attorney for all other Appellees.

[fol. 36] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

It is hereby stipulated and agreed by and between the attorneys for the parties to the appeal now pending in this cause, in the United States Court of Appeals for the Third Circuit, that the Record on Appeal shall consist of the following:

1. Complaint filed by appellants in the United States District Court for the District of New Jersey.
2. Order to Show Cause issued by the United States District Court for relief pending the proceedings on the Complaint.
3. Motions by all appellees to dismiss the Complaint.
4. Agreed Statement of Facts.
5. Judgment (entitled Order) dismissing the Complaint and Order to Show Cause made on April 26th, 1950, by the Honorable Thomas F. Meaney, Judge of the United States District Court for the District of New Jersey.
6. Notice of Appeal.
7. Points relied upon by Appellants.

Anthony A. Calandra, Attorney for Appellants. C. William Caruso, Attorney for Appellee, Duane E. Minard, Jr., etc. Charles Handler, Attorney for All Other Appellees.

[fol. 37] IN UNITED STATES DISTRICT COURT

POINTS RELIED UPON BY APPELLANT

Jerry Malanga, Joseph Maglione and Frank D'Innocenzio, the appellants, will rely upon the following points in the appeal now pending in the United States Court of Appeal for the Third Circuit.

1. That the United States District Court for the District of New Jersey, has original jurisdiction to grant the relief prayed for in the Complaint.

2. That the constitutional rights of the appellants guaranteed them by the Fourth and Fifth Amendments of the Constitution of the United States of America were violated.

3. That the constitutional rights of the appellants are fundamental and basic rights and are vested rights over which the United States District Court for the District of New Jersey must invoke the protections guaranteed by the Fourth and Fifth Amendments of the Constitution of the United States of America. and other amendments, to the extent prayed for, and grant the relief requested by the appellants as charged in their Complaint.

4. That the denial of the relief requested by the appellants will cause appellants irreparable injury.

5. Appellants are not required to exhaust their remedies, if any they may have, in the State Courts of New Jersey, before invoking the processes of the Federal Courts for the relief which they seek.

6. That the appellants have no adequate remedy in any of the State Courts of New Jersey, because all appellate courts of said state have consistently held that the fruits of an unlawful search and seizure, if evidential *per se*, are admissible in evidence against the accused.

Respectfully, Anthony A. Calandra, Attorney for appellants.

[fol. 38] [Stamp:] Received & Filed May 29, 1950. Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Civil Action Petition to Consolidate

Docket #10,211

GEORGE STEFANELLI, Appellant,

vs.

DUANE E. MINARD, etc., et als, Appellees

Civil Action Petition to Consolidate

Docket #10,212

JERRY MALANGA, et als, Appellants,

vs.

DUANE E. MINARD, etc., et als, Appellees

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The above entitled causes are now pending on appeal from the judgments of the United States District Court for the District of New Jersey.

The appellants in each of the above entitled matters filed a complaint in the United States District Court for the District of New Jersey seeking equitable relief pursuant to the provisions of Title 8 U. S. C. A. Section 43; commonly referred to as "Civil Rights Laws". Appellants contend that their fundamental and civil and basic rights were infringed in violation of the Fourth and Fourteenth Amendments of the Federal Constitution. Appellants by these proceedings sought to suppress certain evidence seized by police officers and detectives taken by them, without their consent, and without a warrant for their arrest or a search warrant to seize their property and further to enjoin the appellees from the use of said evidence in any trial in the State Courts of New Jersey.

Appellants, after the seizure of their property, were [fol. 39] arrested and charged with the crime of book-

making in violation of the laws of the State of New Jersey.

Appellants contended in the United States District Court for the District of New Jersey that irreparable injury would be caused them if the said court did not grant them the relief prayed for. Orders to Show Cause were issued by the trial court and the complaint and said orders were dismissed, after oral argument, by said Court.

Appellants and Appellees, through counsel, have by written stipulation agreed to the facts necessary to be considered on the appeals.

The questions involved and points to be argued are the same in each of the appeals and may reasonably and logically—heard and argued together.

We respectfully pray that an order be made by this Honorable Court consolidating the appeals so that but one Brief and Appendix thereto be filed by appellants for the consideration and determination of the issues involved in each appeal.

Respectfully,

Anthony A. Calandra, Attorney for Appellants.

[fol. 40] [Endorsed:] United States Court of Appeals for the Third Circuit. George Stefanelli, Appellant, vs. Duane E. Minard, etc., et als, Appellees. Jerry Malanga, et als, Appellants, vs. Duane E. Minard, etc., et als, Appellees. Civil Action Petition to Consolidate. Docket #10,211. Civil Action Petition to Consolidate. Docket #10,212. Anthony A. Calandra, Counsellor at Law, 31 Clinton Street, Newark, New Jersey.

[fol. 41] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,211

GEORGE STEFANELLI, Appellant,

v.

DUANE E. MINARD, etc., et al., Appellees

No. 10,212

JERRY MALANGA, et al., Appellants,

v.

DUANE E. MINARD, etc., et al., Appellees

Upon consideration of the motion of Anthony A. Calandra, Esquire, attorney for the appellants, and with the consent of counsel for the appellee,

It is Ordered that the above entitled cases be and they hereby are consolidated for briefing and argument.

Maris, Circuit Judge.

May 29, 1950.

(Received & Filed May 29, 1950. Ida O. Creskoff, Clerk.)

[fol. 42] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket 10,211-10,212

GEORGE STEFANELLI, Plaintiff-Appellant,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, et als., Defendants-Respondents

JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO, Plaintiffs-Appellants,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, et als., Defendants-Respondents

On Appeals from Orders of the United States District Court, District of New Jersey

ORDER EXTENDING TIME FOR FILING AND SERVING DEFENDANTS-RESPONDENTS' BRIEF

Upon application of defendants-respondents in the above entitled cause, and good cause being shown therefor, it is on this 30th day of June, 1950,

Ordered that the time for the serving and filing of the defendants-respondents' brief be and the same is hereby extended to September 25, 1950, inclusive.

McLaughlin, Circuit Judge for the Court.

(Received & Filed June 30, 1950. Ida O. Creskoff, Clerk.)

[fol. 43] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,211

GEORGE STEFANELLI, Appellant,

v.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, et al.

No. 10,212

JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO, Appellants,

v.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, et al.

Argued October 19, 1950

Before Biggs, Chief Judge, and Kalodner and Hastie, Circuit Judges

OPINION OF THE COURT—Filed October 31, 1950

Per Curiam:

The appeals in the instant cases are without merit. Every question here raised by the appellants can be asserted by [fol. 44] them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. Federal courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury which is clear and imminent. Douglas v. Jeannette, 319 U. S. 157. As to the application of the principles of the Fourth Amendment to the cases at bar see Wolf v. Colorado, 338 U. S. 25. The judgments will be affirmed.

A true Copy. Teste:

——— ———, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 45] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,211

GEORGE STEFANELLI, Appellant,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey;

JOHN SHULTZ, Prosecutor's Detective for Essex County; William Anderson, Prosecutor's Detective for Essex County; Frank O'Neill, Chief of Police, City of Newark; Lawrence W. Sheridan, Police Officer, City of Newark; and Kenneth Lacey, Police Officer, City of Newark

On Appeal from the United States District Court for the District of New Jersey

Present: Biggs, Chief Judge, and Kalodner and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Ida O. Creskoff, Clerk.

October 31, 1950.

(Received & Filed Oct. 31, 1950. Ida O. Creskoff, Clerk.)

[fol. 46] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,212

JERRY MALANGA, JOSEPH MAGLIONE AND FRANK D'INNOCENZIO, Appellants,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey;

FRANK O'NEILL, Chief of Police of the City of Newark, New Jersey; George E. Kaas, Police Commissioner of the City of Newark; William Hull, Police Detective of the City of Newark; James Clark, Police Detective of the City of Newark; Clifford Heiss, Police Detective of the City of Newark; John Walter, Police Detective of the City of Newark; Anthony D'Amidio, Police Detective of the City of Newark; and Albert Franks, Police Detective of the City of Newark

On Appeal from the United States District Court for the District of New Jersey

Present: Biggs, Chief Judge, and Kalodner and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Ida O. Creskoff, Clerk.

October 31, 1950.

(Received & Filed Oct. 31, 1950. Ida O. Creskoff, Clerk.)

[fol. 47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 14, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5105)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. 458 2

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE AND FRANK D'INNOCENZIO,

Petitioners,

vs.

DUANE E. MINARD, JR., PROSECUTOR FOR ESSEX COUNTY, NEW JERSEY, ET AL.,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANTHONY A. CALANDRA,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 458

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE AND FRANK D'INNOCENZIO,

Petitioners,

vs.

DUANE E. MINARD, JR., PROSECUTOR FOR ESSEX COUNTY, NEW JERSEY, ET AL.,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully represent:

Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in each of the foregoing cases on October 31st., 1950, affirming the judgment orders of the United States District Court for the District of New Jersey dismissing the complaints filed therein (R. 43, 44).

The issues, facts, matters and things urged and argued in the respective complaints and in the appeals to the circuit court were common to each cause of action, and, by order of the court of appeals, the appeals were consolidated resulting in one Opinion in both appeals (R. 40).

Petitioners filed verified complaints in equity seeking to suppress certain evidence seized from the premises of the petitioners, by local police officers acting under colof of their office, without a search warrant, warrant for arrest and without the knowledge, consent and approval of the petitioners. The complaints were filed in the district court by virtue and authority of what are commonly referred to as "Civil Rights Acts," Title 8 U.S.C.A. Section 43 and Title 28 U.S.C.A. Section 1343 (3), wherein it is provided that federal courts shall have original jurisdiction to redress deprivation of any rights secured to them by the United States Constitution. Petitioners prayed that irreparable damage would be caused them if the relief sought was not granted. The district court dismissed the complaints upon the sole ground that petitioners had not first exhausted their remedies under the laws of the State of New Jersey, (R. 13a, 30a).

Opinion Below

There was no written opinion by the district court. The Opinion by the appeals court affirmed the district court (R. 42), 184 Fed. (2) 575, as follows:

> The appeals in the instant cases are without merit. Every question here raised by the appellants can be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. Federal courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury which is clear and imminent. Douglas *v.* Jeanette, 319, U.S. 157. As to

the application of the Fourth Amendment to the cases at bar see Wolf *vs.* Colorado, 338 U.S. 25. The judgments will be affirmed.

Jurisdiction

The judgments of the United States Court of Appeals for the Third Circuit were entered on October 31st., 1950. The jurisdiction of this Honorable Court is invoked by virtue of Title 28 U.S.C.A. 1254 (1).

Question Presented

1. Whether Federal District Courts should enjoin State prosecuting officials and officers from using evidence in state criminal trials, which evidence has been seized as the result of an admitted unlawful and unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments.

2. Whether petitioners should be compelled, first, to attempt to enjoin or suppress the use of evidence in the State Courts of New Jersey, despite continuous holdings by all New Jersey appellate courts that evidence obtained as the result of an unlawful and unreasonable search and seizure is admissible in evidence, if evidential per se.

3. Whether the Civil Rights Acts, Title 8 U.S.C.A. Section 43 and Title 28 U.S.C.A. Section 1343 (3) supply the remedy of enforcing basic and fundamental rights secured by the Constitution against local police incursion into privacy and run counter to the guaranty of the Fourteenth Amendment.

4. Whether the search and seizure in such circumstances is unconstitutional.

Statutes Involved

Title 8 U.S.C.A. Sec. 43:

Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress.

Title 28 U.S.C.A. Section 1343 (3):

To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

United States Constitutional Amendments Involved

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

Fourteenth Amendment: * * * nor shall any State deprive any person of life, liberty or property without due process of law; * * *

New Jersey Constitutional Amendment Involved

Art. 1. Par 7: The right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures shall not be violated; and

no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and things to be seized.

Statement of Facts

Petitioner, Stefanelli, together with his family resided on the first floor of premises #88 Tremont Avenue, Newark, New Jersey. In the afternoon of December 6th, 1949, county and city detectives broke into his home, through a kitchen door, and gained entrance to the apartment rooms of petitioner without his consent and approval made a search therein and seized papers, paraphernalia and things which pertained to the wagering on race horses. Petitioner, after the search and seizure and from the result thereof was placed under arrest and on the following day charged before a local magistrate with the crime of bookmaking in violation of New Jersey Statutes. (R. 7a-8a).

Petitioners, Malanga, et als, occupied the third floor attic rooms of premises #201 North 13th Street, Newark, New Jersey. In the afternoon of April 5th, 1950, police officers of the City of Newark, broke down the door of one of the said rooms and gained entry without the consent and approval of the petitioners. The police without the consent and approval of the petitioners, searched the rooms and seized therein papers, paraphernalia, and things which pertained to the wagering on race horses. Petitioners, after the search and seizure and from the result thereof were placed under arrest and on the following day charged before a local magistrate with the crime of bookmaking in violation of New Jersey Statutes. (R. 26a-27a).

Respondent, Minard, in each of the cases is the Prosecutor for Essex County, and in such capacity is charged with the duty of prosecuting violators of State criminal laws. All other respondents are police officers and county

detectives, who by virtue of their office, are charged with the customary functions in the investigation and detection of crime. All respondents act by virtue of the authority invested in them and enforce laws under color of State law.

In the district court and in the court of appeals petitioners and respondents entered into an Agreed Statement of Facts (Stefanelli, R. 15a to 17a); (Malanga, et als, R. 34a, 35a), and it was more particularly agreed in both cases, as follows:

(1) the officers did not have a warrant for arrest or a search warrant to make a seizure in the respective premises of the petitioners, (R. 15 and 34).

(2) the officers gained entrance to the respective premises without the consents of the petitioners (R. 14 and 34).

(3) that papers, paraphernalia and things, the property of the petitioners', pertaining to wagering and booking bets on horses in violation of New Jersey Revised Statutes 2:135-3, relating to the crime of bookmaking, were seized by said officers (R. 15 and 34).

(4) that the matters and things taken by the said police officers were concededly evidential per se, and therefore, admissible in evidence under the law of the State of New Jersey, in a prosecution for the crime of bookmaking (R. 15 and 35).

(5) that at the time of the searches and seizures, petitioners were arrested and arraigned the day following in a magistrates court, charging the offense of bookmaking being conducted by the respective petitioners on the day of the searches and seizures (R. 15 and 34).

(6) that the fruits of the search and seizure made of petitioners' property in their premises will be used in evidence before the Grand Jury and at the trial of petitioners upon any indictments returned (R. 16 and 35).

(7) that petitioners have taken no proceedings in the State Courts to suppress the evidence which they claim to have been unlawfully seized in violation of their constitutional rights (R. 16 and 35).

(8) that petitioners have pleaded not guilty to the charges of bookmaking made against them, and are awaiting trial (R. 16 and 35).

Specification of Errors

The court of appeals, erred:

1. In holding that petitioners should first exhaust their remedies in the New Jersey State Courts.

2. In affirming the district court judgments.

3. In refusing to find that irreparable injury to petitioners is great and imminent.

4. In refusing to find that the petitioners' constitutional rights under the Fourth and Fourteenth Amendments are basic and fundamental rights and enforceable in equity proceedings instituted by virtue of and the authority of the "Civil Rights Acts", of the United States.

5. In refusing to find that unreasonable and unlawful searches and seizures by state police officers in violation of the Fourth Amendment are in *Pari materia* with all other rights secured under the Constitution and subject to injunctive relief under the Civil Rights Acts of the United States.

Reasons for Granting the Writ

1. The issues raised by the equity proceedings herein are of great importance in the uniform administration of justice involving sacred, basic and fundamental constitutional rights of all the people. A clarification of such rights should be determined by the authority of this court in

deciding what specific constitutional amendments are applicable to state criminal prosecutions. In *Jeanette* v. *Douglas*, 319 U. S. 157, and *Hague* v. *C. I. O.*, 307 U. S. 496, and many others, this Honorable Court has upheld the right of freedom of speech and of religion secured by the First Amendment to be the subject of protection by injunction where those rights are violated. *The Fourth Amendment is in pari materia with the rights secured under the First Amendment.*

In *Wolf* v. *Colorado*, 338 U. S. 25, this Honorable Court had the following question for consideration:

> Does a conviction by a state court for a State offense deny the "due process of law," required by the Fourteenth Amendment solely because the evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissable in a prosecution for violation of federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied to *Weeks* v. *U. S.*, 232 U. S. 383, 58 Law Ed. 652?

This Honorable Court held in answer to this question:

> "We hold, therefore, that in a prosecution in a State court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

It would appear from the above quotations that the questions here raised are settled, But, the following language in the *Wolf* case, makes it clear that some remedy is available, viz:

> (At pages, 27, etc.). "The security of one's privacy against arbitrary intrusion by the police—which is the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty and as such enforceable against the

States through the due process clause. The knock on the door, whether by day or by night, as a prelude to search, without authority of law but solely upon the authority of the police did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking people.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. *But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.* (Italics ours).

The Civil Rights Acts, supra, provide the remedy by which constitutional rights should be made effective and arbitrary conduct checked. Independent suits in equity to suppress evidence have been brought successfully against Federal officials by individuals from whom evidence was illegally obtained, *Perlman* v. *U. S.*, 247 U. S. 7; Burdeau McDowell, 256 U. S. 465. The right to enjoin State officers from violating basic and fundamental constitutional rights has been recognized and approved in equity proceedings wherein vested rights under the First Amendment were involved, *Jeanette* v. *Douglas, supra*; *Hague* v. *C. I. O., supra*. The remedy involved at bar does not conflict the doctrine that a Federal Court of Equity will not normally interfere with State criminal proceedings.

The proceedings at bar do not require the Federal Court to interfere with a State cirminal proceeding, or enjoin a

State court or a State judge. A State criminal action may be still prosecuted, as long as other evidence is used, not the evidence illegally obtained. The injunction extends only to those individuals duly served with process and brought within the jurisdiction of the Federal Court. It is a well established exception that a Federal court will enjoin State criminal proceedings where irreparable harm will be done and no other remedy is adequate. *Fenner* v. *Boykin*, 271 U. S. 240; *Ex Parte Young*, 209 U. S. 123; *Packard* v. *Banton*, 264 U. S. 140; *Beal* v. *Missouri, P. R. Co.*, 312 U. S. 45.

Carter v. *Illinois*, 329 U. S. 173, holds, "the due process clause of the Fourteenth Amendment does not operate to enforce upon states a uniform code of criminal procedure; and it is for them to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures". See also *Snyder* v. *Mass.*, 291 U. S. 173.

From the facts at bar, it is clear that the basic and fundamental rights of the petitioners have been violated. The respondents concede that the fruits of the search and seizures will be used in evidence at the trial of the indictments against them. The danger to petitioners is imminent, great and clear, and only by means of the proceedings at bar can the immunities and privileges of petitioners be secured.

2. The law on search and seizure in New Jersey has been settled and the highest appellate courts have consistently held "that papers unlawfully procured by an unreasonable search and seizure are admissable in evidence, if evidential per se", *State* v. *MacQueen*, 69 New Jersey Law 522; *State* v. *Lyons*, 99 New Jersey Law 301; *State* v. *Giberson*, 99 New Jersey Law 85, and the most recent decision on the

question, *State* v. *Pinsky*, 6 New Jersey Super. 90, decided January 4th, 1950. The provisions of the New Jersey Constitution relating to unreasonable searches and seizures was urged in the New Jersey cases above cited, but the final holding sustained the unlawful and protested searches and seizures. For the petitioners to make any attack in New Jersey Courts would only result in stare decisis.

The Opinion at bar holds that the questions can be raised in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. But, that raises a very important question as to multiplicity of actions, delays in prosecution and does not overcome the irreparable injury to petitioners. If petitioners were first required to assert their rights in New Jersey courts, irreparable damage will have aleady been caused them. While petitioners could directly appeal to the Supreme Court of New Jersey, directly from the county court in which the indictments would be tried (New Rules of New Jersey Practice and Procedure Rule 1:2-1) in causes involving a question arising under the Constitution of the United States or of the State of New Jersey. Not only are we faced with the findings in the cases above cited, but also the holding in *State* v. *Giberson, supra*, that the Fourth Amendment of the United States Constitution and Art. I, section 6 (now Art. 1. Par. 7, supra) of the New Jersey Constitution are of no protection. Furthermore, In *State* v. *MacQueen, supra*, the court held that the first ten amendments to the United States Constitution are limited to the sphere of the federal government and no prohibition upon the states.

The bookmaking statute in New Jersey involves severe penalties. Upon conviction the punishment involved is imprisonment for not less than one year nor more than five years, or, a fine of not less than a $1000.00, or more than $5000.00. If petitioners were to be convicted, they could

not as a matter of right be admitted to bail pending appeal. The trial court must be satisfied that there is a reasonable doubt as to the legality of the judgment of conviction before allowing bail. The only foreseeable ground of appeal would be the unlawful search and seizure here complained of. Petitioners could be incarcerated pending the appeals suggested by the court of appeals below and further irreparably damaged.

3. The Civil Rights Laws, Title 28 U. S. C. A., 1343 (3), grants to United States District Courts and Title 8 U. S. C. A. 43, original jurisdiction to grant equitable relief as here sought by petitioners. The rights, privileges and immunities secured by the Constitution (8 U. S. C. A. 43) are the subject of suits in equity and enforceable. There is no other remedy available to petitioners excepting by the proceedings as here instituted. These proceedings are not against the State, but individuals, who by color of their office have violated constitutional rights of petitioners and cause them irreparable damage, unless the relief sought is granted.

In *Fenner* v. *Boykin*, 271 U. S. 240, this Honorable Court held:

> "when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, excepting under extraordinary circumstances, where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this should be done. The accused should first set up and rely upon his defense in the state courts, even though this challenges the validity of some statute, *unless it plainly appears that this course would not afford adequate protection.* (Italics supplied)

See also, *Douglas* v. *Jeannette*, 319 U. S. 157; *Carter* v. *Illinois*, 329 U. S. 173; *Snyder* v. *Mass.*, 291 U. S. 97; *Chambers* v. *Florida*, 309 U. S. 227; *Hague* v. *C. I. O.*, 307 U. S. 496, and others.

The trial court, below may have had in mind rules of comity, but, "rules of comity or convenience must give way to constitutional rights, *Oklahoma Natural Gas* v. *Russell*, 261 U. S. 290, 283.

In *Bell* v. *Hood*, 327 U. S. 678, 684, this Honorable Court held . . . "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

The trial court and the court of appeals erred in the dismissal of the complaints and in refusing to grant the relief prayed for by petitioners.

Conclusion

A writ of certiorari should be issued by this Honorable Court for the reasons stated and in the public interest, so that basic and fundamental rights of all citizens be protected from unlawful and unreasonable searches and seizures.

Respectfully,

ANTHONY A. CALANDRA,
Attorney for Petitioners.

Office Supreme Court, U. S.
FILED
SEP 15 1951
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 2.

EORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO,

Petitioners,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, *et als.*,

Respondents.

ON WRIT FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

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Supreme Court of the United States

October Term, 1951.

No. 2.

George Stefanelli, Jerry Malanga, Joseph Maglione and Frank D'Innocenzio,

Petitioners,

vs.

Duane E. Minard, Jr., Prosecutor for Essex County, New Jersey, *et als.*,

Respondents.

ON WRIT FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

Opinion Below.

There was no written opinion by the district court. The Opinion by the appeals court affirmed the district court (R. 32, 184 Fed. (2d) 575) viz.:

> The appeals in the instant cases are without merit. Every question here raised by the appellants can be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. Federal Courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury which is clear and imminent. Douglas *v.* Jeanette, 319 U. S. 157. As to the application of the Fourth Amendment to the cases at bar see Wolf *vs.* Colorado, 338 U. S. 25. The judgments will be affirmed.

Jurisdiction.

The judgments of the United States Court of Appeals for the Third Circuit were entered on October 21st, 1950. The jurisdiction of this Honorable Court is invoked by virtue of Title 28 U. S. C. A. 1254 (1).

Questions Presented.

1. Whether the rights secured to the people by the Fourth Amendment to the Constitution of the United States are enforceable against State and local police officers, in State criminal proceedings, by means of equity proceedings in Federal Courts to enjoin and suppress the use of evidence obtained by unreasonable searches and seizures.

2. Whether the "Civil Rights Laws", Title 8 U. S. C. A. Section 43 and Title 28 U. S. C. A. Section 1343 (3) supply the remedy of enforcing basic and fundamental rights secured by the Constitution against local police incursion into privacy and run counter to the guarantees of the Fourth and Fourteenth Amendments.

3. Whether petitioners should be compelled, first, to attempt to enjoin or suppress the use of evidence in the State Courts of New Jersey, despite continuous holdings by all New Jersey appellate courts that evidence obtained as the result of an unlawful and unreasonable search and seizure is admissible in evidence, if evidential *per se*.

4. Whether the search and seizure in such circumstances is unconstitutional and in violation of due process of law.

Statutes Involved.

Title 8 U. S. C. A. Sec. 43:

Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress.

Title 28 U. S. C. A. Section 1343:

(a) The District Courts shall have original Jurisdiction of any civil action authorized by law to be commenced by any person.

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED:

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment: * * * nor shall any State deprive any person of life, liberty or property without due process of law; * * *

NEW JERSEY CONSTITUTIONAL ARTICLE INVOLVED:

Art. 1. Par 7: The right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and things to be seized.

NEW JERSEY REVISED STATUTES:

2;135-3. Any person who shall habitually or otherwise, buy or sell what is commonly known as a pool, or any interest or share in any such pool, or shall make or take what is commonly known as a book, upon the running, pacing or trotting, either within or without this State, of any horse, mare or gelding, or shall conduct the practices commonly known as bookmaking or pool selling or shall keep a place to which persons may resort for engaging in any such practices or for betting upon the event of any horse race or other race or *contest*, either within or without this State, or for gambling in any form, or any person who shall aid, abet or assist in any such acts, shall be guilty of a misdemeanor, and punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment in the State prison for not less than one year nor more than five years.

Specification of Errors.

The Court of Appeals, erred:

1. In holding that the petitioners should first exhaust remedies in the New Jersey State Courts.

2. In refusing to find that petitioners' constitutional rights under the Fourth Amendment of the Constitution of the United States are basic and fundamental and enforceable by means of equity proceedings in the District Court, by authority of the "Civil Rights Laws" (Title 8 U. S. C. A., Section 43, and Title 28, U. S. C. A., Section 1343 (3)).

3. In refusing to find that unlawful and unreasonable searches and seizures by State and local police officers are in violation of basic and fundamental rights secured by the Fourth Amendment and Fourteenth Amendment, and, that such rights are in Pari Materia with *all* the rights, privileges and immunities, secured and guaranteed by the Constitution; and, are subject to injunctive relief and suppression of the use of the fruits of unlawful and unreasonable searches and seizures.

4. In refusing to find that irreparable injury would be caused to the petitioners by the use of such evidence at the trial in the State Courts against the petitioners is great and imminent.

5. In refusing to find that petitioners will be denied Due Process of Law by the use of such evidence by respondents in the trials in the State Courts.

6. In affirming the judgments of the District Court.

Statement of Facts.

Petitioner, Stefanelli, together with his family resided on the first floor of premises No. 88 Tremont Avenue, East Orange, New Jersey. In the afternoon of December 6th, 1949, county and city detectives broke into his home through a kitchen door, and gained entrance to the apart-

ment rooms without his consent and approval, made a search therein, and seized papers, paraphernalia and things which pertained to the wagering on race horses (R. 6 and 7). The police officers had neither a warrant for petitioner's arrest nor a search warrant authorizing the search and seizure complained of, at the time of the entry. Petitioner, *after* the search and seizure and from the fruits thereof was placed under arrest and on the following day formally charged before a local magistrate with the crime of bookmaking in violation of New Jersey Statutes (R. 12).

Petitioner was indicted by the Essex County Grand Jury for this alleged crime, and, promptly filed a verified bill of complaint in the United States District Court for the District of New Jersey, seeking to enjoin the respondents from using the property unlawfully seized at any trial or hearing by virtue of and authority of the "Civil Rights Laws", Title 8, U. S. C. A., Sec. 43, and Title 28, U. S. C. A., 1343 (3) and claiming a violation and deprivation of his constitutional rights secured under the Constitution of the United States (R. 15 to 20). The relief sought was merely to enjoin and suppress the use of the evidence unlawfully obtained; that irreparable injury which was imminent and clear would be caused him by the use of said evidence, and not to enjoin the respondents from prosecuting petitioner.

Petitioners, Malanga, Maglione, and D'Innocenzio, occupied the third floor attic rooms of premises No. 201 North 13th Street, Newark, New Jersey. In the afternoon of April 15th, 1950, police officers of the City of Newark, New Jersey, broke down the door of one said rooms and gained entry without consent and approval of petitioners (R. 19 and 20). The police officers, without a warrant for the arrest of the petitioners, or any one of them, and without a search warrant, searched the rooms and seized therein

papers, paraphernalia and things which pertained to the wagering on race horses. Petitioners, *after* the search and seizure and from the fruits thereof were placed under arrest and on the following day were charged before a local magistrate with the crime of bookmaking in violation of New Jersey Statutes (R. 25). Petitioners thereafter filed a verified bill of complaint in the United States District Court for the District of New Jersey, seeking to enjoin the respondents from using the property unlawfully seized at any trial or hearing by virtue and authority of the "Civil Rights Laws", Title 8, U. S. C. A., Section 43, and Title 28, U. S. C. A., Section 1343 (3) (R. 2 to 7) and claiming a violation *and deprivation* of their constitutional rights secured under the Constitution of the United States. The relief sought was merely to enjoin and suppress the use of the evidence unlawfully obtained; that irreparable injury which was imminent and clear would be caused them by use of said evidence; and not to enjoin the respondents from prosecuting petitioners.

Petitioners entered into an Agreed Statement of Facts (Stefanelli, R. 11 and 12; Malanga, *et als.*, R. 24 and 25) wherein it was essentially stipulated that (1) respondents did not have a warrant for the arrest of petitioners, (2) respondents had no search warrant for the search of the petitioners' respective premises and to make a seizure therein; (3) that entry to petitioners' respective premises was made without their respective consents; (4) that *after* such entry by the respondent police officers, petitioners made no resistance to the search and seizure; (5) that papers, paraphernalia and other things, the property of petitioners pertaining to the wagering and booking of bets on horses in violation of New Jersey Revised Statutes 2:135-3, relating to the crime of bookmaking were seized by said officers; (6) that the matters and things taken by said police are

evidential per se, and therefore admissible in evidence under the laws of the State of New Jersey for the crime of bookmaking; (7) that petitioners were arrested on the occasion of the aforesaid seizures and on the following day arraigned before a local magistrate and charged with the crime of bookmaking, and at the time of arraignment warrants issued for their arrest; (8) that the fruits of the searches and seizures *will be used* by respondents at the trials of the petitioners for the crime of bookmaking; (9) that all of petitioners pleaded not guilty to the charges and (10) petitioners took no proceedings in the New Jersey Courts to suppress the seized evidence.

Because of the foregoing Agreement of Facts, no testimony was taken by the District Court on the motions made by respondents to dismiss the proceedings. The motions to dismiss were on the following grounds: (1) that the complaints failed to state a claim against respondents, and (2) that the District Court lacked jurisdiction (Stefanelli, R. 8, 9; Malanga, *et als.*, R. 22).

The District Court dismissed the petitioners' respective suits in equity upon the ground that petitioners should first exhaust their remedies under State law (Stefanelli, R. 9, 10 and Malanga, *et als.*, R. 22, 23).

The learned Court of Appeals for the Third Circuit, affirmed the District Court, but recognized the authority of Federal Courts to enjoin criminal proceedings where *irreparable injury was clear and imminent;* but, followed *Wolf* vs. *Colorado,* 338 U. S. 25, in holding that the Fourth Amendment did not apply to the cases at bar (R. 32).

Summary of Argument.

Local police officers, without any apparent restraint, have made searches and seizures of property and used the evidence seized in State criminal proceedings just so long

as the evidence seized was *evidential per se*. The highest appellate courts in New Jersey have sanctioned the means by which police officers secure evidence just as long as the property seized is evidential *per se*. The constitutional privileges and immunities guaranteed to the people by the Fourth and Fourteenth Amendments of the Constitution of the United States afford no protection whatsoever in State prosecutions to the people against the incursions complained of here. This Honorable Court has consistently condemned any such conduct by federal officers in most stern and effective language. Yet, local police officers are permitted to do the opposite of what is so strongly preserved by the immunities guaranteed to all of the people by our Federal Constitution.

Our Federal statutes, Title 8 U. S. C. A. 43 and Title 28 U. S. C. A. 1343 (3), commonly called "Civil Rights Laws", expressly provide the ways and means to protect rights, privileges and immunities guaranteed by the constitution to all the people, and provides for equal rights to all citizens and persons. These statutes grant unto District Courts *original* jurisdiction to redress the rights, privileges, and immunities secured by the Constitution, by action at law, suit in equity, or other property proceedings for redress.

Petitioners, by their respective suits in equity, and by authority of the aforesaid "Civil Rights Laws", sought to enjoin the respondents from the use of the evidence unreasonably obtained and suppress the use of the same at the trial of the State criminal charges pending against them for bookmaking (R. 5 and 18).

Petitioners did not seek to enjoin respondents from any prosecution by respondents of the pending criminal charges.

The appeals of Stefanelli and Malanga, *et als.*, were consolidated by Order of the Court of Appeals (R. 30) resulting in one opinion for both appeals. Stefanelli and Malanga,

et als., by virtue of the consolidation jointly petitioned this Honorable Court for a writ of certiorari, Case No. 458, October 1950 Term and the same was granted on May 14th, 1951 (R. 35). The facts, issues and questions involved being common in both cases and logically and reasonably could be heard and argued together.

Petitioners admit that the evidence seized from their respective premises is evidential *per se* under New Jersey law (R. 12 and 25). Respondents admit (1) that the respective premises of the petitioners were entered without their consents (R. 11 and 25); (2) that the police officers did not have a warrant for their arrest; (3) or a search warrant to make any seizure (R. 11 and 24) and (4) that the fruits of the searches and seizures will be used in evidence at the trials of petitioners for violations of New Jersey Revised Statutes 2:135-3, relating to the crime of bookmaking (R. 11 and 25).

The case of Stefanelli is separate and distinct from Malanga, *et als.*; are not related to each other, except as to the questions here involved being common to both.

ARGUMENT.

The rights secured to the people by the Fourth Amendment are enforceable against local and State police officers by equity proceedings in Federal courts.

Petitioners, by authority of Title 8 U. S. C. A. Section 43, which provides:

> "Civil Action for Depreviation of Rights.
>
> Every person, who, under color of any statute ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of suit, suit in equity or other proper proceedings for redress.

and by authority of Title 28 U. S. C. A. Section 1343, which provides:

> (a) The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

filed verified bills of complaint in the District Court, charging, among other things, that their constitutional rights were violated by the respondents. The complaints further charged that the respondent police officers under the color of their office as police officers broke into and entered their respective premises, without their consents and approval and acquiescence made a search and seized papers, paraphernalia, and other things, pertaining to the wagering and booking of horses, being their property, allegedly in violation of the New Jersey Statutes relating to the crime of bookmaking. Further, the complaints charged that it was the intent of the respondents to use the aforesaid fruits of the search as evidence in the criminal charges made against petitioners for bookmaking. And further, that unless the fruits of the unlawful search and seizure were suppressed and returned to petitioners that they would be

caused irreparable harm and injury and that petitioners had no adequate remedy in the State Courts of New Jersey (Stefanelli, R. 3, 4; Malanga, *et al.*, R. 16, 17).

The relief sought by the respective petitioners was a restraint and injunction against respondents from using as evidence against them the fruits of the unreasonable search and seizure, together with all leads and information therefrom, at any trial or hearing intended to be prosecuted by respondents against the petitioners. They also prayed that the property taken and seized from the petitioners be returned and the use thereof, as evidence, be suppressed at any trial or hearing prosecuted by respondents in the State Courts of New Jersey (Stefanelli, R. 5; Malanga, *et al.*, R. 18, 19).

The respondents named in the complaints were local and county police officers, excepting Duane E. Minard, Jr., who as County Prosecutor was charged with the duty of prosecuting petitioners upon the evidence obtained by the other respondents.

All parties to the equity proceedings are citizens of the United States of America, and residents of the State of New Jersey. They are all within the jurisdiction of the United States District Court for the District of New Jersey, wherein the instant proceedings were instituted. The respondents by color of law and the authority vested in them by law, custom and usage committed the acts complained of by petitioners, *U. S.* v. *Classic*, 313 U. S. 299, 326; *Screws* vs. *U. S.* 325 U. S. 91, 107, 108; *Williams* vs. *U. S.*, Case No. 325, October Term, 1950, decided by this Honorable Court on April 23rd, 1951.

Independent suits in equity to suppress evidence have been successfully brought against federal officials by individuals from whom evidence was illegally obtained, *Perl-*

man vs. *U. S.*, 247 U. S. 7; *Burdeau* vs. *McDowell*, 256 U. S. 465.

The right to enjoin State officers from violating basic and fundamental constitutional rights has been approved in equity proceedings wherein vested rights under the First Amendment were involved, *Hague* vs. *C. I. O.*, 307 U. S. 496; *Douglas* vs. *Jeannette*, 319 U. S. 157. The proceedings in these cases were instituted by authority of the federal statutes relied upon by petitioners and the history of these statutes has been extensively reviewed in *Jeannette* and *Hague*, so that a repetition thereof would be superfluous.

In *Douglas* vs. *Jeannette, supra*, this Honorable Court held that federal courts should not enjoin a criminal proceeding save in exceptional cases to prevent irreparable injury which is clear and imminent. The petitioners in this case sought to enjoin threatened proceedings by the municipality and the relief was denied because there was no showing that the danger was of irreparable injury which was clear and imminent. The allegations of the petitioners against the municipality were that certain of petitioners and other Jehovah's Witnesses had been prosecuted for distributing literature without a license as prescribed by ordinance and that the municipality had *threatened* to enforce the ordinance against petitioners and other Jehovah's Witnesses. In this case the constitutional right under the First Amendment to the United States Constitution was claimed to have been violated.

But, the situation with petitioners at bar is entirely different than in *Jeannette, supra*. Respondents admit that the fruits of the searches and seizures *will be used* in the prosecution of the bookmaking charges now pending against petitioners upon indictments secured for the purpose (R. 12, 25). The danger by the use of the fruits of these seiz-

ures is imminent and clear, and, if not for this pending certiorari, petitioners would have long since been put to trial. If the evidence is not suppressed and the respondents enjoined from its use, irreparable injury could result to petitioners, because of the conceded fact that under the law of the State of New Jersey, the evidence which was seized, is in fact evidential *per se* (R. 12 and 25). The very purpose and object of seeking suppression of evidence in cases of federal origin was to eliminate the unlawfully seized evidence from consideration, because its use was not only a violation of the Fourth Amendment, but, likewise a violation of the Fifth Amendment, which is the privilege against self incrimination, *Gouled* vs. *U. S.*, 255 U. S. 298; *Agnello* vs. *U. S.*, 269 U. S. 20; *U. S.* vs. *Lefkowitz*, 285 U. S. 452, and many others.

Search and Seizure Law in New Jersey.

The Appellate Courts in New Jersey have repeatedly ruled upon claims of unlawful searches and seizures in state cases. The leading New Jersey cases which we hereafter cite are urged to sustain our contention that petitioners have no adequate remedy in New Jersey Courts and that only the federal courts can grant the relief which appellants seek.

The respondent police officers acted in accordance with "use and custom" as permitted by decisions in the highest state courts of New Jersey, that "papers unlawfully procured by an unreasonable search and seizure are admissible in evidence, if evidential *per se*", *State* vs. *MacQueen*, 69 New Jersey Law 522 (Supreme Court); *State* vs. *Lyons*, 99 New Jersey Law 301 (Court of Errors and Appeals); *State* vs. *Pinsky*, 6 N. J. Super. 90 (decided January 4th, 1950), which follows and approves the *MacQueen* case and

in which the following finding appears (*State* vs. *MacQueen*, *supra*), viz:

> (At page 527): "This exception has been discussed by counsel for the plaintiffs in error as if it raised some question of a violation of rights secured by the fourth and fifth amendments of the federal constitution; the former which prohibits 'unreasonable searches and seizures', and the latter declares among other things, that no person shall be compelled in any criminal case, to be a witness against himself. The case of Boyd *vs.* U. S., 116 U. S. 616, is cited as an authority. It is, however, established that the first ten amendments of the Constitution of the United States are limited to the sphere of the federal government, its courts and officers, and constitutes no prohibition upon the states. Barron *vs.* Baltimore, 7 Pet. 243; Smith *vs.* State of Maryland, 18 Howard 71, 76; Spies *vs.* Illinois, 123, U. S. 131, 166. This prohibition against unreasonable searches and seizures is embodied in the Constitution of the State, Art. 1, par. 6".
>
> (At page 528): "As to the mode in which the document now in question was obtained, it is very generally held *that papers unlawfully procured, even by means of an unjustifiable search and seizure are nevertheless admissible, if evidential per se.* Greenleaf Evid., Sec. 254A, etc. * * *" (Italics supplied).

And, the New Jersey Court of Errors and Appeals, in *State* vs. *Giberson*, 99 New Jersey Law 85, held:

> (At page 87): "The contention on behalf of the defendant is that all of the personal property mentioned in the petition should have been returned to her, because taken from her by unreasonable search and seizure in violation of the Constitution of the United States and of this State. The answer is, *that the provisions of the Constitution of the United States in this regard are limitations, upon federal*

> *but not State powers.* Spies *vs.* Illinois, 123 U. S. 131; Brown *vs.* New Jersey, 175 U. S. 172 and other cases. And our constitution Art. 1. Section 6, secures persons and property against unreasonable searches and seizure * * *".

The New Jersey Constitution, Art. 1, Par. 7, is the same as the old constitutional provision existing when the foregoing cases were decided, viz:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and things to be seized."

It is clear that the highest New Jersey appellate courts have considered the federal constitutional amendments *as well* as the state constitutional provisions pertaining to unreasonable searches and seizures, and have consistently held that "papers unlawfully procured, even by means of an unjustifiable search and seizure are nevertheless admissible, if evidential *per se.*" Any attempt by petitioners to seek the desired relief and protection of the Federal and State provision as to unreasonable searches and seizures appears futile.

Faced with this situation, the petitioners could not succeed in having the fruits of the unlawful and unreasonable searches and seizures suppressed by any proceeding in the State Courts of New Jersey. If application were to be made to the trial court by petition, or, during the course of the trials on the charges of Bookmaking, the trial court would be bound by the prior rulings in *MacQueen, Lyons, Giberson* and *Pinsky* cases, *supra.*

There is no adequate remedy in the New Jersey Courts.

If the petitioners were compelled to exhaust their rights in the State Courts for the same relief which they seek in the Federal Court, irreparable damage will have been caused them. We know of no way of convincing the trial court, or the appellate courts that the New Jersey rule "that papers *unlawfully* procured by an *unreasonable* search and seizure are admissible in evidence, if evidential *per se*", is bad law. Apparently, all Constitutional arguments have been exhausted in State Courts. As a consequence the property of the petitioners will be admitted in evidence against them and being concededly "evidential *per se*" would result in irreparable injury to the petitioners.

The punishment required to be imposed upon those convicted of Bookmaking in violation of New Jersey Revised Statutes 2:135-3, is *mandatory*. Imprisonment of not less than 1 year or more than 5 years, or a fine of not less than $1,000.00 or more than $5,000.00 may be imposed (Brief, p. 4). It is common knowledge that in Essex County, New Jersey, excepting in very few rare cases, upon conviction for Bookmaking, all have been imprisoned for the minimum prison term, at least.

If petitioners were to appeal from a conviction to the Supreme Court of New Jersey, the only forseeable ground of appeal is the question of unreasonable search and seizure, and as we have already pointed out, the law of which has been definitely established,—that cumulative argument would merit no consideration. Petitioners could only be admitted to bail, pending appeal, *if* the trial court or appellate court finds that there is a "reasonable doubt as to the legality of the judgment of conviction". The state of the law in New Jersey being as it is, petitioners would languish

in jail pending determination of the appeals in the State Court. By the time the procedures directed by the learned Third Circuit would be exhausted, the questions here raised would become moot, insofar as they would apply to petitioners.

The learned appeals court in the decision at bar, however, held "Federal Courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury which is clear and imminent" (R. 32).

The irreparable injury and harm to petitioners, is clear and imminent. Petitioners have been indicted by a grand jury for the crime of bookmaking. Respondents will use the fruits of their unreasonable search and seizure against petitioners (R. 12 and 25). *These facts are conceded by them in clear, convincing and unequivocal language. The use of the evidence is not "threatened" as was the situation in Douglas* vs. *Jeanette, supra.*

The admitted facts at bar show convincingly the extraordinary circumstances involved, (1) the fact that the seized evidence is concededly evidential *per se* under New Jersey law, (2) that the evidence was obtained by breaking into petitioners' premises without a warrant for the arrest of petitioners or a warrant to make a search of and seizure in their premises, (3) that under the New Jersey law as determined by the highest appellate courts that "papers unlawfully procured by an unreasonable search and seizure are admissible in evidence, if evidential *per se*", (4) that the fruits of the search *will* be used against petitioners, *all* spell out a clear and convincing danger which is immediate. If respondents did not intend to use the evidence, there possibly would have been no indictment. Having obtained an indictment, respondents' clear purpose is to seek a conviction and punishment of the petitioners as provided by law.

It is our system of government to *not* prolong or provoke litigation endlessly. It is not only costly but "justice delayed is justice denied". The problem of exhausting State remedies in most types of cases has adequately been determined by the United States Supreme Court. Most all the proceedings have resolved themselves particularly in *habeas corpus* cases. In this type of case the relief sought was the discharge of the moving party.

But in the cases, at bar, the situation is entirely different. We are seeking relief and the security guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution, and the remedies enacted by Congress, for the purpose, by means of the "Civil Rights Laws", *supra*, which give federal courts original jurisdiction to grant the relief prayed for.

It cannot be denied that the petitioners have fundamental and basic rights under the Fourth Amendment and which rights are not necessary of repetition.

In *Fenner* vs. *Boykin*, 271 U. S. 240, the Supreme Court held:

> "When absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done excepting under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this should be done. The accused should first set up and rely upon his defense in State courts even though this involves a challenge of the validity of some statute, *unless it plainly appears that this course would not involve adequate protection.*" *Ex Parte* Young, 209 U. S.

123; Terrace *vs.* Thompson, 263 U. S. 418; Frink Dairy Co. *vs.* U. S., 274 U. S. 455.

In *Brown* vs. *New Jersey*, 175 U. S. 172, at page 175, the United States Supreme Court held:

> "The State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Ex Parte* Reggel, 114 U. S. 642; Chicago *vs.* Chicago, 166 U. S. 226." (Italics supplied.)

In *Douglas* vs. *Jeanette*, 319 U. S. 157, our Supreme Court held:

> (At pages 163, 164): "* * * Where the threatened prosecution is by state officers for alleged violations of state law, the state courts are the final arbiters of its meaning and application, subject only to review but this court on federal grounds appropriately asserted. Hence the arrest by federal courts of the processes of the criminal law within the states, and the determination of criminal liability under state law by a federal court of equity, are to be supported only on a showing of irreparable injury 'both great and immediate.' Spielman Motor Sales Co. *vs.* Dodge, 295 U. S. 89, 95, 79 Law Ed. 1322, 1325, 55 Sup. Ct. 678, and cases cited; Watson *vs.* Buck, 313 U. S. 45, 49, 85 Law Ed. 577, 579, 61 Sup. Ct. 418; and cases cited; Williams *vs.* Miller, 317 U. S. 599, *ante*, 489, 63 Sup. Ct. 258."

In *Beal* vs. *Missouri P. R. Co.*, 312 U. S. 45, our Supreme Court held:

> "The issuance of injunctive relief by Federal Courts against the enforcement of state criminal statutes can be justified only in most exceptional cir-

cumstances, and upon a clear showing that an injunction is necessary in order to prevent an irreparable injury."

In *Carter* vs. *Illinois*, 329 U. S. 173, our Supreme Court held:

"The due process clause of the Fourteenth Amendment does not operate to enforce upon the states a uniform code of criminal procedure; and it is for them to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures."

In *Snyder* vs. *Mass.*, 291 U. S. 97, our Supreme Court held:

(At page 105): "* * * The Commonwealth of Massachusetts is free to regulate the procedure of its Courts in accordance with its own conception of policy and fairness, *unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.* Twining *vs.* New Jersey, 211 N. S. 78; Rogers *vs.* Peck, 199 U. S. 425; Maxwell *vs.* Dow, 170 U. S. 581; Hustado *vs.* California, 110 U. S. 516; Frank *vs.* Mangum, 237 U. S. 309; Powell *vs.* Alabama, 287 U. S. 45; Brown *vs.* Mississippi, 297 U. S. 278" (Italics supplied).

Chambers vs. *Florida*, 309 U. S. 227, our Supreme Court held:

"The due process provisions of the Fourteenth Amendment was intended to guarantee procedural standards adequate and appropriate then and thereafter to protect at all times persons charged with or suspected of crime by holding positions of power and authority."

In accordance with the principle enunciated in *Fenner* vs. *Boykin*, 271 U. S. 240, *the interference by federal courts with local police officers shall be done only where it plainly appears that proceedings in the State Court does not involve adequate protection, Ex Parte Young*, 209 U. S. 123; *Terrace* vs. *Thompson*, 263 U. S. 418; *Frink Dairy Co.* vs. *U. S.*, 274 U. S. 453. *Our analysis of the New Jersey law, plainly emphasizes that petitioners at bar have no adequate protection by any proceedings by them in the State Courts of New Jersey.*

The principle of law established by this Honorable Court in *Carter* vs. *Illinois*, 329 U. S. 173, clearly emphasizes that the Fourteenth Amendment does not operate to enforce upon states a uniform code of criminal procedure and how crimes are brought to book, "so long as they observe those dignities of man which the United States Constitution assures". The Fourth Amendment of the Constitution is basically involved in petitioners' claims and its requirements have been violated by the police respondents at bar; and, we will further argue its application to the States by means of the Fourteenth Amendment. The New Jersey Courts, by reason of the cases we have cited, *supra*, will not compel respondents to "observe those dignities of man which the United States Constitution assures".

The principle established in *Snyder* vs. *Mass.*, 291 U. S. 97, . . . a state is free to regulate the procedure of its courts within its own conception of fairness, *but* in doing so it shall not offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The guaranty to the people under the Fourth Amendment against unreasonable searches and seizures, have been declared by this Honorable Court to be "basic, fundamental and implicit in the concept of ordered liberty", *Wolf* vs. *Colorado*, 338 U. S. 25, 27. The conduct

of the police respondents at bar "offended some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", hence the local police, the respondents at bar, have violated every concept of the constitutional rights, privileges and immunities, and permittedly so, because of the long standing decisions in New Jersey sanctioning such incursions of privacy, so strongly condemned by this Honorable Court in *Wolf* vs. *Colorado, supra,* and *MacDonald* vs. *U. S.,* 335 U. S. 451.

There can, therefore, be no adequate remedy to petitioners in the New Jersey Courts, and resort to the federal courts by the equity proceedings as here instituted by them, is their only protection to secure the rights, privileges and immunities guaranteed them by the Constitution and invoked through the *Civil Rights Laws, supra.*

Although repetitious, we respectfully revert back to the language of Title 8, U. S. C. A., Section 43, viz.: *every person who . . . of any State causes to be subjected any citizen of the United States or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity or other proceeding for redress.*

Title 28, U. S. C. A., Section 1343, not only gives *original* jurisdiction to district courts for redress, but says . . . *to redress the deprivation . . . of any right, privilege or immunity security by the Constitution or by any Act of Congress providing for* EQUAL *rights of citizens or of all persons within the jurisdiction of the United States.*

It is to be especially noted, that the statutes in question make no distinctions between citizens of the United States and of a State, that United States citizenship is not an essential for giving the District Court jurisdiction, but EQUALITY to all in preserving Constitutional rights. *These statutes clearly and unmistakably include each and every*

part of the Constitution, without reservation or exception.

The charged and conceded facts applying to the petitioners at bar, if a federal case *ab initio*, make out a clear and convincing case, where the federal courts, without hesitation, would order a suppression of the evidence and enjoin the individuals from its use at any trial or hearing.

ARE NOT LOCAL POLICE OFFICERS IMMUNE TO THE CONSTITUTIONAL RIGHTS SECURED THE PEOPLE FURTHER PROTECTED BY THE "CIVIL RIGHTS LAWS."?

The *Wolf* Case.

Respondents will rely upon *Wolf* vs. *Colorado*, 335 U. S. 25, as authority that petitioners' claims should be denied. The learned District Court dismissed the suits in equity because petitioners had not exhausted their remedies under state law (R. 9, 10 and 22, 23). The United States Court of Appeals for the Third Circuit affirmed this decision and held that petitioners should exhaust their remedies in the New Jersey State Courts and "the way to the Supreme Court of the United States lies open"; and further affirmed upon authority of *Wolf* vs. *Colorado, supra* (R. 32). However, the appellate court cited *Douglas* vs. *Jeanette*, 319 U. S. 157, for the proposition that federal courts should not enjoin criminal proceedings in state courts, save in exceptional cases to prevent irreparable injury which is imminent and clear.

Seemingly, we cannot reconcile the opinion of the appellate court in the case at bar. The facts in the *Wolf* case were not as clear cut, insofar as the search and seizure were concerned as those facts relating to the petitioners at bar. A reading of the respondent's Brief, in *Colorado* vs. *Wolf*, is most convincing that the illegality of the search and seizure was seriously disputed. Respondents contended

that the search and seizure of the Wolf records was lawful and incident to a lawful arrest. The records were in open view in Dr. Wolf's office and were taken by the police after they had gone to his office to arrest him on a charge of abortion committed by the doctor upon a woman who had accused Dr. Wolf of having committed the act upon her.

In the situation at bar, respondents concede that they entered the premises of petitioners without consent or approval, had no search warrant or warrant for the arrest of petitioners, that the evidence seized was evidential *per se* under New Jersey law and would be used at the trials of petitioners to sustain the criminal charges for bookmaking. In the *Wolf* case, the record shows that the case was tried and that the prosecution offered evidence to convict, *in addition*, to the alleged "unlawfully seized" records. Wolf asked this Honorable Court for a *reversal of his conviction on constitutional grounds*, which we shall now take up. But, before doing so, may we reiterate, the petitioners, Stefanelli, Malanga, Maglione and D'Innocenzio, *seek only to suppress the evidence unlawfully and unreasonably taken from them. They do not seek to enjoin the respondents from prosecuting them upon the indictments* now pending against them in the New Jersey Courts, and which arise from their arrests *after* the unlawful searches and seizures of which they complain in these proceedings.

In *Wolf* vs. *Colorado*, 338 U. S. 25, this Honorable Court considered the following question:

> Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained by circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infrac-

tion of the Fourth Amendment as applied in Weeks *vs.* United States, 232 U. S. 383. . . .

This question was answered, thusly:

(p. 33) We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. . . .

It would appear from the above quotations that the questions here raised are settled. But, the following language in the *Wolf* case, makes it clear that some remedy is available, viz:

(p. 27, etc.) The security of one's privacy against arbitrary intrusion by the police—which is the core of the Fourth Amendment—is basic to a free society. *It is therefore implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause.* The knock at the door whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English speaking peoples. (Italics supplied.)

(p. 28) *Accordingly, we have no hesitation in saying that were a State to affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.* But the ways of enforcing such a basic right raises questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude varying solutions which spring from an allowable range of judgment

> on issues not susceptible of quantitive solution. (Italics supplied.)

Further, this Honorable held:

> (p. 33) . . . And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under section 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States.

Wolf *sought a reversal* of the conviction upon the ground that unreasonably seized evidence was admitted in evidence, over objection, and that his constitutional rights secured by the Fourth Amendment were violated and he was therefore denied due process. It appears from the opinion in this case that Colorado has a constitutional provision against unreasonable searches and seizures. The question to be decided on the certiorari, if favorable to Wolf, and from the purport of the question, the conviction would have been reversed.

However, the position of the petitioners at bar seek no restraint against any prosecution for the crimes for which they have been indicted and await trial. Petitioners merely seek the suppression of the evidence which admittedly unlawfully and unreasonably taken. Such other evidence which the respondents may have to sustain the indictments is not the subject of these proceedings, and the

respondents would not be "hampered" because of and by the granting of the relief which petitioners here seek.

In the *Wolf* case, this Honorable Court, found that the unlawful search and seizure denied Wolf due process, but the use of the evidence did not. A study of this opinion suggests to us, that the mode of procedure by Wolf was perhaps inadequate.

In New Jersey, the courts have affirmatively sanctioned "police incursions into privacy", and unanimously have held "that papers unlawfully procured by an unreasonable search and seizure are admissible in evidence, if evidential *per se*", *State* vs. *MacQueen*, 69 N. J. Law 522; *State* vs. *Lyons*, 99 N. J. Law 301; *State* vs. *Giberson*, 99 N. J. Law 85, *State* vs. *Pinsky*, 6 N. J. Super. 90, decided January 4th, 1950. In *State* vs. *Giberson*, the Court held that the Fourth Amendment to the Constitution of the United States, and Article 1, Section 6 (now Article 1, Par. 7, of the new Constitution) of the New Jersey Constitution are of no protection against unreasonable searches and seizures. Furthermore, in *State* vs. *MacQueen*, *supra*, and *State* vs. *Giberson*, *supra*, the court held that the first ten amendments to the Constitution of the United States are limited to the sphere of the federal government and no prohibition upon the states. Any attempt by petitioners to seek any remedy in the State Courts of New Jersey, would be thwarted by virtue of the foregoing decisions.

Therefore, there is an affirmative sanction by the New Jersey courts of the police incursions complained of by petitioners and runs counter to the guaranty of the Fourteenth Amendment, Wolf vs. *Colorado, supra.*

Perhaps, it may be argued by respondents, that by reason of comity, federal courts should not intervene in State criminal prosecutions. But, "rules of comity or convenience must give way to constitutional rights", *Oklahoma Natural*

Gas vs. *Russell*, 261 U. S. 290, 293. "The due process clause" of the Fourteenth Amendment does not operate to enforce upon states a uniform code of criminal procedure; and it is for them to choose the methods and practices by which crime is brought to book, *so long as they observe those ultimate dignities of man which the United States Constitution assures.*", *Carter* vs. *Illinois*, 329 U. S. 173. See also *Snyder* vs. *Mass.*, 291 U. S. 173.

This Honorable Court, in the *Wolf* case, found that a basic right was violated in that the evidence was unlawfully seized from him, but, nevertheless, held that it could be used against Wolf at the trial and affirmed the conviction. However, this learned Court likewise held:

> (p. 28) . . . "But the ways of enforcing such a basic right raises questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions which are not to be so dogmatically answered as to preclude varying of judgment on issues not susceptible of quantitative solution."

We sincerely submit, that the remedy to enforce such a basic right to check such arbitrary conduct is found in the "Civil Rights Laws" under which petitioners proceeded and consistent in the concept of an ordered liberty. Title 8, U. S. C. A. 43, provides for instituting civil action for *deprivation* of rights by actions at law, suits in equity, or other proper proceedings for redress." Title 28, U. S. C. A. 1343 (3), gives to federal courts original jurisdiction, to "redress the deprivation of any right, privilege, or immunity secured by the Constitution of the United States." An injunction proceeding is a suit in equity, *Hague* vs. *C. I. O.*, 307 U. S. 496; *Douglas* vs. *Jeannette*, 319 U. S. 157, and the foregoing "Civil Rights Laws" are discussed in

these opinions, at length. These congressional enactments are the answer, we humbly repeat, to overcome and settle the "incursions into privacy" so strongly condemned in the *Wolf* case, *supra*, and in many decisions of this Honorable Court, the citation of which would now be seemingly superfluous.

Parallel, and with the recognition by this Honorable Court, that unreasonable searches and seizures by State police officers is in violation of due process (*Wolf* case) are the "coerced confession cases". We respectfully submit for consideration the most recent decisions relating to the admissibility in State cases of confessions alleged to have been obtained by State police officers under circumstances amounting to coercion, viz.: *Watts* vs. *Indiana*, 338 U. S. 49; *Turner* vs. *Pennsylvania*, 338 U. S. 62; *Harris* vs. *So. Carolina*, 338 U. S. 68, and *Williams* vs. *U. S.*, No. 365, October term, 1950, decided April 23rd, 1951. These cases represent an extension of a long line of cases requiring as a matter of due process, the exclusion of coerced confessions. In all of these cases the decision turned on determining whether the police activities in the circumstances of each of the cases amounted to coercion and the involuntary admission of the commission of a crime the police were investigating. Having resolved this issue in the affirmative, this Honorable Court held that "due process barred the admission in evidence of the confessions so obtained." These cases through the Fourteenth Amendment emphatically applied the Fifth Amendment.

In the foregoing "confession cases" a firm rule of exclusion was made the law of the land, to the end that "coerced confessions obtained by local police officers" are not admissible in evidence against the accused, and therefore shall be excluded. In the *Wolf* case, this Honorable Court held that the federal exclusionary rule is a judicially created rule of

evidence under the Fourth Amendment, but of itself, did not bar the use in evidence of what the Fourth Amendment condemned.

And, this Honorable Court through the Fourteenth Amendment literally and emphatically applied the First Amendment to the States in its very terms. *Everson* vs. *Board of Education*, 330 U. S. 1; *West Virginia State Board of Education* vs. *Barnette*, 319 U. S. 624, 639; *Bridges* vs. *California*, 314 U. S. 252, 268; *Hague* vs. *C. I. O.*, 307 U. S. 496, and many others.

This Honorable Court through the Fourteenth Amendment has granted the rights, privileges, and immunities secured under the First and Fifth Amendments to the end that there would be equality in the "*concept of ordered liberty*" for all of the people. The Fourth Amendment is of equal importance in the uniform administration of justice: Congress has legislated the means whereby rights, privileges and immunities may be redressed by the enactment of the "Civil Rights Laws".

The Fourth Amendment is as equally applicable to the States as are the First and Fifth Amendments and there should be no distinction made in the application of the Fourth Amendment to the States, and more particularly to the respondents at bar.

If the "coerced confessions" should not be admitted in evidence then the fruits of an unlawful and unreasonable search and seizure should be likewise excluded by injunction and suppression proceedings.

With permission, respectfully, we adopt and quote and urge the eloquent language of Mr. Justice Black, in *Wolf* vs. *Colorado*, 338 U. S. 25, viz.:

> (P. 40) It is not amiss to repeat my belief that the Fourteenth Amendment was intended to make the

> Fourth Amendment in its entirety applicable to the States. The Fourth Amendment was designed to protect people against unrestrained searches and seizures by Sheriffs, policemen, and other law enforcement officers. Such protection is essential in a free society. And I am unable to agree that the protection of the people from over-zealous or ruthless state officers is any less essential in a country of "ordered liberty" than is the protection of people from overzealous or ruthless federal officers. Certainly there are far more state than federal enforcement officers and their activities, up to now, have more frequently and intimately touched the daily lives of people than have the activities of federal officers. A state officers "knock at the door . . . as a preclude to a search without authority of law", may be as our experience shows, just as ominous to "ordered liberty" as though the knock were made by federal officers.

The facts at bar, unequivocally, admit that the searches and seizures complained of by petitioners, are in violation of their constitutional rights under the Fourth Amendment. That the fruits thereof *will be used* at the trial of the criminal charges now pending against the petitioners has been admitted by the respondents. That the fruits of the searches and seizures are admissible in evidence under New Jersey Law is likewise conceded by all of the parties to this certiorari.

Petitioners have no adequate remedy in the State Courts of New Jersey, and the only protection of their sacred, fundamental and basic rights can only be preserved by means of the relief prayed for under the proceedings instituted by them in the District Court as sanctioned and permitted by the "Civil Rights Laws", *supra*.

POINT II.

Petitioners' suits in equity should not have been dismissed.

The learned District Court erred in dismissing the complaints. The complaints should not have been dismissed so long as facts alleged therein are sufficient to establish a claim to any relief in equity, and, whether or not the pleader is entitled to the relief which he prays.

Keiser vs. *Walsh*, 118 Fed. (2) 13, 14, holds:

> "We need not consider whether appellant has asked for proper relief. By rule 54 (c) of the Federal Rules of Civil Procedure . . . 'every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' Accordingly, a complaint is sufficient if it sets forth facts which show that the plaintiff is entitled to any relief which the court can grant."

Ware vs. *Travelers Ins. Co.*, 150 F. (2) 463, 405, holds:

> "The fact that the plaintiff may not be entitled to all the relief sought does not warrant dismissal of the entire suit * * * under existing rules of pleading a complaint is not to be turned away unless on the facts pleaded he is entitled to no relief."

Bell vs. *Hood*, 327 U. S. 678, 684, our United States Supreme Court held, viz.:

> "* * * It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do. Moreover, where federally protected rights have

been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides *for* a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." (Italics ours.)

In accordance with the obligation of the Federal Courts to "use any available remedy to make good the wrong done (*Bell* v. *Hood*)", and in contrast with the finding of the learned trial court in dismissing the complaints at bar, this Honorable Court should conclude that it was error to dismiss the complaints and to deny the injunctive relief sought because of any inability which may be thought to exist to enjoin the respondents, particularly since petitioners are primarily interested in preserving constitutional rights.

The trial court in holding that state remedies should be first exhausted by petitioners may have had in mind rules of comity. But, as "Rules of comity or convenience must give way to constitutional rights" (*Oklahoma Natural Gas Co.* vs. *Russell*, 261 U. S. 290, 293, the plain language and purpose of the Civil Rights Laws is to clothe the Federal Courts with power to protect constitutional rights and see that the rights, privileges, and immunities thereunder are *equally* enforced. Moreover the legislative history of Title 8, U. S. C. A., Section 43, demonstrates that it was the purpose of Congress to supply an original equitable remedy in Federal Courts irrespective of any other remedies which might exist in the State tribunals (See 44 C. R. 361, 365, 373, 416, 429, 449, 459, 476, 485, 501, 502, 609, 653, etc.) For this reason it has been held that there is no need to exhaust available State remedies as a condition to instituting an action under Section 43, *Hague* vs. *CIO*, 307 U. S. 496, 532.

In *Mass. State Grange* vs. *Benton*, 272 U. S. 525, this Honorable Court said:

> "No injunction ought to issue against officers of a State clothed with authority to enforce the law in question, *unless a case reasonably free from doubt and when necessary to prevent great and irreparable injury.*" (Italics supplied.)

The facts charged in the petitioners' respective complaints are clear. The affidavits of each petitioner was annexed to the respective complaints (Stefanelli, R. 6, 7, and Malanga, *et als.*, R. 19, 20). Each of the complaints charged a breaking into the premises by local police officers without their consents (Stefanelli, R. 3, and Malanga, *et als.*, R. 16); that without their consent, acquiescence and approval a search was made and papers, paraphernalia and other things, being their property was seized (Stefanelli, R. 3, and Malanga, *et als.*, R. 16); that the fruits of the search and seizure will be used by respondents on criminal charges involving the violation of New Jersey criminal laws relating to bookmaking (Stefanelli, R. 4, and Malanga, *et als.*, R. 17); that irreparable harm and injury would be caused petitioners by the use of the seized evidence (Stefanelli, R. 4, and Malanga, *et als.*, R. 17); that petitioners have no adequate remedy in the New Jersey State Courts (Stefanelli, R. 4, and Malanga, *et als.*, R. 18) and the respective complaints further alleged that the equity proceedings were brought in the District Court which had original jurisdiction by virtue of Title 28, U. S. C. A., 1343 (3) and Title 8, U. S. C. A., Section 43.

The Agreed Statement of Facts entered into between all of the parties made it abundantly clear that the searches and seizures were made without a warrant of arrest or a search warrant. Also, that the seized evidence was admis-

sible in evidence against petitioners because under New Jersey law, it was evidential *per se*. Respondents admit that the entry into petitioners' respective premises was made without their consent and approval and that the seized evidence *will* be used in the criminal trials of petitioners upon their indictments. These admissions amplify the fact that the complaints in equity set forth a cause of action cognizable in the Federal Courts. The pleadings and the Agreed Statement of Facts, set forth a cause of action free from doubt and clearly showed the obvious irreparable injury to petitioners.

In *Wolf* vs. *Colorado,* a reversal of a conviction was sought because of the violation of a right under the Fourth Amendment and of the Fourteenth Amendment. If Wolf had proceeded by means of the Civil Rights Laws, such as we have, perhaps the final determination by this Honorable Court would have been different. Wolf knew in advance that the evidence he complains of would be used against him. He knew, too, the state of the law in Colorado, which State had rejected the Weeks' doctrine, as has New Jersey.

The language of Mr. Justice Frankfurter clearly implies that there must be some effective remedy against the police "incursions into privacy". We humbly submit that the means to make secure against the intrusions complained of is amply supplied by the Civil Rights Laws, by which petitioners have proceeded to preserve their rights.

The people of these United States have a serious situation confronting them. The Constitution of the United States is the law of the land. Is unlawful and unreasonable search and seizure to be sanctioned and approved by State Courts in direct contravention of the basic and fundamental rights guaranteed to all under the United States Constitution? The security of any person is in jeopardy

and in a land where we seek equality in the enforcement of all laws, and which all of us are bound to obey the law of the State as well as the United States, the enforcement of the Constitutional Amendments, *should be equally interpreted,* whether State or Federal, and thereby insure a well ordered and free society. Federal officers enforce Federal laws and State Officers enforce Municipal and State Laws. In the enforcement of these laws, is it to be said that if Federal Officers pursue the same course of conduct as was pursued in the case at bar by State Officers, by similar conduct the Federal Officers would be restrained; and, in State prosecutions the State Police Officers are apparently condoned when violating the same basic and fundamental rights of security as provided under the Fourth Amendment to the United States Constitution.

As was held in *Snyder* vs. *Mass.*, 291 U. S. 97 and *Carter* vs. *Illinois*, 329 U. S. 173, it is reserved to the States to have a uniform code of criminal procedure and free to regulate the procedure of its courts, but in so doing, *"those ultimate dignities of man which the United States Constitution"* assures, is observed; and in so doing, "there is no offense of some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

We have explained under Point I our position that the Civil Rights Laws under which petitioners have proceeded are protective of the situation about which we complain. The *Wolf* decision should not be held as the law of the land because the question raised does not dispose of the proposition where irreparable damage and injury is involved.

Judicial decisions are law and are just as effective, if not more so, as are legislative enactments. While the law of search and seizure has been referred to frequently "as a rule of exclusion", nevertheless, the full import and effect

of such a rule is that it fully prescribes and determines the security of one's person, liberty and property.

Title 28, U. S. C. A., 1343 (3), grants District Courts original jurisdiction to "redress the deprivation, under color of State law . . . of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for EQUAL rights of citizens or persons . . ." (Emphasis supplied).

The equality of rights in this Statute, creates no barrier between, what a federal officer may or may not do, or what a State police officer may or may not do. We submit, that the very object of this statute was to protect the people against the conduct of the States, police officers, Sheriffs, etc., wherein federally protected rights would not be transgressed, because State policy in bringing crime to book might be considered paramount to the Constitution of the United States.

As we have pointed out under Point I of this Brief, the Courts of the State of New Jersey, have sanctioned violations of the Fourth Amendment by the police officers by holding that the first ten amendments of the Constitution of the United States are limitation upon Federal but not State powers, *State* vs. *Giberson*, 99 N. J. Law 85, 87. Further, the prohibition against unreasonable searches and seizures in the Federal and New Jersey Constitution are no protection in State cases, *State* vs. *Mac Queen*, 69 New Jersey Law 522, 527 and other cited cases.

The admissibility of the fruits of the unlawful and unreasonable searches and seizures against petitioners, being affirmatively sanctioned by New Jersey Courts, runs counter to the guaranty of the Fourteenth Amendment (*Wolf* vs. *Colorado*, 335 U. S. 25, 28).

Conclusion.

We respectfully submit that the petitioners are entitled to the relief which they seek. We have shown and it is agreed that the evidence unlawfully taken from the petitioners will be used in evidence against them. We have shown that this evidence will be used in criminal proceedings thereby causing irreparable and immediate damage and danger to the petitioners. There has been no showing by the respondents that petitioners would not be irreparably damaged by the use of the fruits of the searches and seizures involved according to our Agreed Statement of Facts.

We have shown that the relief which we seek, by all of the cited authorities, is the vested right of the petitioners. The very nature of and the acts and course of conduct pursued by the respondents and the admitted intention to use the fruits of an unlawful and unreasonable search and seizure from their respective premises, *requires* the relief we seek.

We, therefore, respectfully submit that this Honorable Court should have the complaints reinstated and the trial court directed to make an order suppressing the evidence unlawfully and unreasonably taken from the petitioners and that the respondents be enjoined from the use of said evidence at any trial or hearing and to grant petitioners all of the prayers of the complaints, respectively.

And we further respectfully urge that by the decision of this Honorable Court that the District Court be directed to enter such order, judgment or decree as shall be uniformly just in the equal administration of justice in conformity with the spirit and intent of the Constitution and the Civil Rights Laws.

Respectfully submitted,

Anthony A. Calandra,
Attorney for Petitioners.

SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
JAN 20 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1950.~~ 54

No. ~~358.~~ 2

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO,
Petitioners,

vs.

DUANE E. MINARD, Jr., Prosecutor for Essex County, New Jersey, *et als.*,
Respondents.

BRIEF OPPOSING PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 458.

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vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, *et als.*,

Respondents.

BRIEF OPPOSING PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I.

Reference to Official Report of Opinion Delivered in the Court Below (*).

The opinion of the United States Court of Appeals for the Third Circuit, the court immediately below, which affirmed the judgments of the United States District Court,

(*) Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief refer to pages of the printed record of the court below.

District of New Jersey, is officially reported at 184 F. (2d) 575.

II.

Counter-statement Concerning Jurisdiction.

Counsel for petitioners state in their petition (p. 3), without elaboration, that the jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, Title 28 U. S. C. A.

We respectfully submit that the decision of the United States Court of Appeals for the Third Circuit in the instant cases involving the questions presented in the petition is in conformity with the provisions of the Federal Constitution respecting the right to freedom from unreasonable search and seizure,(1) and the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Court below.

III.

Counter-statement of the Case.

On December 9, 1949, two detectives attached to the Prosecutor's Office of Essex County, State of New Jersey, together with local police officers of the Police Department

(1) Constitution of the United States, Amendment IV.

of the City of Newark, Essex County aforesaid, gained entry into the premises of George Stefanelli, one of the petitioners herein, at 88 Tremont Avenue, Newark, where Stefanelli was discovered in the act of committing the crime of Bookmaking, the taking of bets over the telephone on the results of horse races. The officers placed Stefanelli under arrest and seized various articles such as racing papers, slips, memoranda and paraphernalia pertaining to Bookmaking in Stefanelli's immediate possession and control. Stefanelli was forthwith arraigned before the Police Magistrate on formal complaint and released in bail to await the action of the Grand Jury.

On April 5, 1950, local police officers of the City of Newark gained entry to premises at 201 North 13th Street, Newark, and discovered Jerry Malanga, Joseph Maglione and Frank D'Innocenzio, three of the petitioners herein, also in the act of committing the crime of Bookmaking. The officers placed them under arrest and seized various articles in their immediate possession and control pertaining to Bookmaking, such as racing papers, scratch-sheets, run-down sheets, slips, papers, memoranda, radio and telephone. They likewise were arraigned forthwith before the Police Magistrate on formal complaint and released in bail to await Grand Jury action.

Under New Jersey law, it is a misdemeanor to "make or take what is commonly known as a book, upon the running, pacing or trotting of any horse, mare or gelding," which is commonly referred to as the crime of Bookmaking; and upon conviction a mandatory penalty shall be imposed of a fine of not less than $1,000 nor more than $5,000, or

imprisonment for a term of not less than one year nor more than five years. (2)

On April 11, 1950, after Stefanelli had been indicted by the Grand Jury and while awaiting trial, he instituted a suit in equity in the United States District Court, District of New Jersey, wherein he sought to have the Court restrain the Essex County Prosecutor, Newark police officials, and the police officers who participated in the raid on his premises, from using as evidence at his criminal State trial the various articles and property taken, upon the claim that the property had been seized without search warrant in violation of the Fourth Amendment to the Federal Constitution.

On April 14, 1950, a similar proceeding was instituted in the Federal District Court by Malanga, Maglione and D'Innocenzio, the other petitioners herein, in which the same relief was sought upon similar grounds, although these petitioners were not as yet indicted by the Grand Jury.

Motions to dismiss the complaints were filed by the defendants, and after argument, the Court ordered the complaints dismissed upon the general ground that the complainants had not exhausted their remedies under State law (R. 13; 30).

An appeal was taken from said order to the Circuit Court of Appeals for the Third Circuit, both cases being consolidated; and the Court of Appeals affirmed the judgment of the District Court (R. 42-44).

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(2) Revised Statutes of New Jersey, Title 2:135-3.

All of the complainants now join in a single petition to this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals.

IV.

Summary of the Argument.

We respectfully submit:

First: The District Court properly refused to exercise its injunctive power to restrain the State prosecuting authorities from using, in the State criminal prosecutions, evidence allegedly procured without search warrant; and it properly applied the rule of comity between the Federal and State courts and the doctrine of exhaustion of State remedies.

Second: The doctrine of *Wolf* v. *Colorado*, 338 U. S. 25; 69 S. Ct. 1359, that the right to freedom from unreasonable search and seizure under the Fourth Amendment cannot be protected through the Fourteenth Amendment, is applicable.

V.

THE ARGUMENT.

POINT ONE.

The United States District Court properly refused to exercise its injunctive power to restrain the State prosecuting authorities from using, in the State prosecutions, evidence allegedly procured without search warrant; and it properly applied the rule of comity between the Federal and State courts and the doctrine of exhaustion of State remedies.

The gist of petitioners' argument seems to be that the Federal Court should have exercised its injunctive power in restraining the State prosecuting authorities from use of the evidence procured by State officers without search warrant, because of the imminent danger of petitioners' conviction in the State court on such evidence and the consequent mandatory penalty to be imposed; because exhaustion of State remedies would involve a "multiplicity of actions;" and that the Civil Rights Laws are a sufficient basis for the granting of the relief sought.

With this we cannot agree.

It is the respondents' contention that in denying the relief sought by petitioners, the District Court properly applied the rule of comity between the Federal and State courts, and the doctrine of exhaustion of State remedies.

The seizure of the property pertaining to Bookmaking was done by State police officers; by members of the County

Prosecutor's Office and of the local municipal police department. Not a single officer of the Federal Government or of any Federal enforcement agency had anything to do with the arrest and seizure.

The property seized consisted of papers, slips, memoranda, racing papers, scratch-sheets, "run-down" sheets, radios and telephones, the usual equipment and paraphernalia necessary to conduct the practices of what is known as Bookmaking on horse races.

Bookmaking is a crime under New Jersey law.

Criminal prosecutions were pending in the State court when petitioners instituted their proceedings in the Federal Court wherein they sought suppression and return to them of the property.

Petitioners concede that the property was used in the commission of the crime; and in their complaints in the Federal Court they conceded that the evidence was evidential *per se* and would be admissible in the State criminal prosecution when they stated, "The matters and things taken by the said police officers were concededly evidential *per se*, and, therefore, admissible in evidence under the law of the State of New Jersey in a prosecution for the crime of Bookmaking." (R. 15; 34).

The State of New Jersey has rejected the doctrine in *U. S. v. Weeks*, 232 U. S. 383, and has adopted the rule that evidence procured as the result of an unreasonable search and seizure is admissible *if evidential per se*. (*State* v. *MacQueen*, 69 N. J. L. 522; *State* v. *Lyons*, 99 N. J. L. 301; *State* v. *Giberson*, 99 N. J. L. 85; *State* v. *Pinsky*, 6 N. J. Super. 90).

The substance of petitioners' complaints in the District Court was that, because the property is evidential *per se* and admissible in evidence under the New Jersey rule in the criminal State prosecution, they would suffer "irreparable harm and injury" because of their futility in objecting to the evidence and the strong possibility of conviction and mandatory penalty of fine or imprisonment.

Petitioners cite *Fenner* v. *Boykin*, 271 U. S. 240; *Ex parte Young*, 209 U. S. 123; *Packard* v. *Banton*, 264 U. S. 140; and *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45. (B. p. 10), as authority for the rule that injunctive relief in the Federal courts may be allowed in "exceptional circumstances" upon a clear showing that the irreparable injury is both imminent and great.

We do not quarrel with the rule except that in those cases the "exceptional circumstances" cannot be compared with what the petitioners claim to be an "irreparable injury" here.

Examination of those cases will disclose that in *Fenner* v. *Boykin, supra*, State prosecuting officials were sought to be restrained from enforcing a State statute making it unlawful to deal in agreements for the purchase and sale of cotton for future deliveries, and the relief asked was denied.

In *Ex parte Young, supra*, the confiscatory character of a State statute fixing railroad rates was involved, and it was held that the Federal courts will, in a proper case, interfere with enforcement of such a statute where it tends to confiscate property in violation of due process under the 14th Amendment.

In *Packard* v. *Banton, supra,* the Federal Court was upheld as having properly dismissed a complaint seeking to restrain enforcement of a State statute regulating taxicab companies and requiring owners to furnish indemnity bonds to secure payment of judgments recovered for personal injuries and property damage.

Beal v. *Missouri Pac. R. Co., supra,* supports the position of the respondents. There the plaintiffs sought to restrain the State prosecuting officials from enforcing by criminal prosecution the Nebraska "Full Train Crew Law," and in upholding the lower court's refusal to intervene, this Court made the following pertinent statements on the applicable rule of comity and exhaustion of State remedies, p. 420 of opinion in 61 S. Ct.:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. (citing cases). No citizen or member of the community is immune from prosecution, in good faith, for his criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. (citing cases).
>
> "This is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. (citing cases). The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their mean-

ing and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds.". (citing cases).

Carter v. *Illinois*, 329 U. S. 173, (quoted from B. p. 10), involved the constitutional right of a defendant to the aid and assistance of counsel, and it was held that there was nothing in the case to indicate any infringement of such right.

Snyder v. *Massachusetts*, 291 U. S. 97 (B. p. 10) merely held that in a prosecution for murder the refusal of the trial court to permit the defendant to be present when the jury was allowed to view the scene of the crime was not a violation of due process under the 14th Amendment to the Federal Constitution.

There is abundant authority to support the rule applied by the District Court that it will refrain from exercising its injunctive power to restrain State criminal prosecutions in deference to the comity existing between the Federal and State courts.

In *Douglas* v. *Jeanette*, 319 U. S. 157; 63 S. Ct. 877, this Court approved the refusal to restrain municipal authorities from enforcing an ordinance prohibiting the distribution of pamphlets without license first obtained under penalty of fine or jail sentence, it being held that such interference should be refused in the case of a "threatened" criminal prosecution on the Court's own motion.

Here the District Court was asked to exercise its injunctive power to restrain the State prosecuting authorities from using at the State trials the evidence procured with-

out search warrant because the "irreparable harm and injury" was the risk of conviction and imposition of mandatory penalty. The Court refused to exercise its power, based upon an observance of the rule of comity and an application of the doctrine of exhaustion of State remedies.

We submit the Court of Appeals properly supported the District Court when it stated that, "Every question here raised by the appellants may be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open." (R. 42).

The same constitutional questions raised in the District Court may well be urged in the State courts of New Jersey in connection with the criminal prosecutions, and the same questions may be determined by the appellate courts and in the State court of last resort. Thereafter, in the event of an adverse determination, petitioners may apply for certiorari to this Honorable Court.

It is to be noted that under the New Rules of New Jersey practice and procedure, petitioners may apply for certification directly from the County Court to the Supreme Court of New Jersey "Where a substantial question arises under the Constitution or a statute of the United States or of this State, which is of general public importance and which urgently requires adjudication by this court." (3)

In *Darr* v. *Burford*, 70 S. Ct. 587, a prisoner serving a sentence under a State conviction applied for *habeas corpus* in the State courts, claiming he had been deprived of his constitutional rights relating to right of counsel. After exhausting his remedies in the State courts he applied for

(3) Rule 1:5-3(a) of the Supreme Court of New Jersey.

habeas corpus in the Federal District Court and his application was denied. The denial was upheld by the Circuit Court of Appeals. On certiorari, this Honorable Court held that the *habeas corpus* was properly denied, because, in order to comply with the rule of exhaustion of State remedies and the rule of comity, the defendant should have applied to this Honorable Court for certiorari immediately after the determination by the State Supreme Court which had passed squarely upon the constitutional questions involved. In reaffirming the rule of comity and the doctrine of exhaustion of State remedies, this Honorable Court emphasized the necessity of avoiding conflict between Federal and State courts, whereby one court refuses to take action until the courts of another sovereignty had had an opportunity of passing on the matter. It approved the following language taken from *Covell* v. *Heyman*, 111 U. S. 176, 182 (p. 591 of opinion in 70 S. Ct.):

> "'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity.'"

See also *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89.

In *Parker* v. *County of Los Angeles*, 338 U. S. 327; 70 S. Ct. 161, which involved the constitutionality of a California statute providing for a "Loyalty Check" program, this Honorable Court again affirmed the rule of comity and

exhaustion of State remedies in the following emphatic language (P. 163 of opinion in 70 S. Ct.):

> "* * * If their claims are recognized by the California courts, petitioners would of course have no basis for asserting denial of a Federal right. It will be time enough for the petitioners to urge denial of a Federal right after the State courts have definitely denied their claims under State law.
>
> "Due regard for our Federal system requires that this Court stay its hand until the opportunities afforded by State courts have exhausted claims of litigants under State law. This is not what is invidiously called a technical rule. The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken with knowledge of the events brought to light for the first time at the bar of this Court. Since the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision, all subsidiary questions fall." (cases cited).

In the instant cases, we submit the State courts are competent to decide whether petitioners had been deprived of their constitutional rights. The appropriate time for the determination of any constitutional question is at the trial of the indictments in the State courts and on appeal to the New Jersey Supreme Court. If the trial court should err to the prejudice of petitioners' constitutional rights it cannot be assumed that the New Jersey Supreme Court would suffer the error to go uncorrected. Under any circumstances, petitioners can always apply to this Honorable

Court for writ of certiorari to review any abridgment of their constitutional rights by the court of last resort of New Jersey.

POINT TWO.

Th doctrine of *Wolf* v. *Colorado*, that the right to freedom from unreasonable search and seizure under the Fourth Amendment cannot be protected through the Fourteenth Amendment, is applicable here.

We submit that the doctrine of *Wolf* v. *Colorado*, 338 U. S. 25; 69 S. Ct. 1359, to the effect that the right to freedom from unreasonable search and seizure guaranteed under the Fourth Amendment cannot be availed of through the Due Process clause of the Fourteenth Amendment is dispostive of the question presented here.

The facts in that case (taken from *Wolf* v. *People*, 187 P. (2d) 926) disclose that local police went to defendant's office and placed him under arrest without warrant, and upon search, made without search warrant, the officers seized certain books containing records of alleged illegal abortions committed. The claim was made in the State courts that there had been a denial of due process under the 14th Amendment because of the violation of the 4th Amendment in making the seizure without search warrant.

After all of the State remedies were exhausted, a certiorari was allowed by this Court to the Colorado Supreme Court. The question was presented whether there was a denial of due process solely because the evidence thus illegally obtained would have rendered it inadmissible in

the Federal court under the doctrine of *U. S.* v. *Weeks*, 232 U. S. 383, which is applicable only to the Federal Government and its agencies and not to the individual misconduct of local officials.

In the opinion, this Court made it plain that the rights guaranteed under the first eight Amendments which are applicable to the Federal government and officials thereof cannot be made to apply to State and local officials by resorting to the due process clause of the 14th Amendment, when it said (p. 1360 of opinion in 69 S. Ct.):

> "Unlike the specific requirements and restrictions placed by the Bill of Rights, Amendments I to VIII, upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject the criminal justice in the States to specific limitations. The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration (citing cases). Only the other day the Court affirmed this rejection after thorough examination of the scope and function of the Due Process clause of the Fourteenth Amendment. Adamson *v.* California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903, 171 A. L. R. 1223. The issue is closed."

In commenting on the *Weeks* doctrine, which is applicable only in the Federal courts involving Federal officials, the Court stated that the rule was not derived from the express requirements of the Fourth Amendment, nor was it based upon legislation expressing Congressional policy in the enforcement of the Constitution, but it was a mere

"rule of exclusion;" that is, a rule of evidence drawn as a matter of "judicial implication" adhered to strictly by the Federal courts which could be changed at any time by Congressional legislation. Thus, it held that evidence procured by local police officers cannot be excluded merely because it would be excluded if procured by Federal officers; and the reason for the exclusion is "less compelling" in the case of State and local officers, as follows (p. 1364 of opinion in 69 S. Ct.):

> "* * * The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

The definite conclusion of this Court was that the Fourteenth Amendment does not forbid evidence procured by State officials by unreasonable search and seizure, when it stated (p. 1364 of opinion in 69 S. Ct.):

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded to the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be pre-

sented should Congress under par. 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States.'"

Petitioners cite *Douglas* v. *Jeanette, supra,* and *Hague* v. *C. I. O.*, 307 U. S. 496 (B. p. 8) in support of the principle that the right of freedom of speech and of religion secured by the First Amendment may be protected by injunction, and then they make the statement that, "The Fourth Amendment is in *pari materia* with the rights secured under the First Amendment," with which we do not agree.

We have hereinbefore discussed the holding in the case of *Douglas* v. *Jeanette, supra.*

And in the *Hague* case, *supra,* this Court held that the freedom of speech and lawful assembly, being inherent in the rights of citizenship, any violations thereof under the First Amendment may be protected through the Fourteenth Amendment.

Wolf v. *Colorado, supra,* specifically holds that the right of freedom from unreasonable search and seizure guaranteed under the Fourth Amendment is applicable to the action of Federal officers, and it cannot be availed of under the due process clause of the Fourteenth Amendment where the action complained of is that of State and local enforcement officers.

Perlman v. *U. S.*, 247 U. S. 7 and *Burdeau* v. *McDowell*, 256 U. S. 465 (B. p. 9), likewise hold that the protection under the 4th and 5th Amendments may be had only when the wrong is committed by officers of the Government or

any of its agencies; and those Amendments were "intended as a restraint upon the activities of sovereign authority" and "not intended to be a limitation upon other than governmental agencies."

Here we are concerned with the activities of State and local enforcement officers and not those of Federal officers.

Petitioners cite *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290 (B. p. 13), in support of their contention that comity should give way to constitutional rights. Examination of that case will disclose that the rule was based upon certain circumstances existing in that case not at all similar to the situation in the instant case. There certain companies furnishing gas to customers in Oklahoma applied to the State Commission for an increase of rates and were refused. They applied to the State Supreme Court for a supersedeas and were again refused. Thereafter they applied to the Federal District Court for injunctive relief claiming that the rates fixed by the State Commission were confiscatory amounting to a denial of their constitutional rights. Applications for temporary injunctions, supported by evidence, were heard by three Federal judges, and were denied. On appeal to this Court, it was held that the companies had done all they can under the State law to get relief, to no avail. Thus came about the statement that, "Rules of comity or convenience must give way to constitutional rights." The conclusion was based upon the proposition that the plaintiffs "had done all they can under the state law," and the cases were remanded to give the plaintiffs an opportunity of showing that they would suffer irreparable injury that was great and immediate.

Bell v. *Hood*, 327 U. S. 678 (cited and quoted from B. p. 13), merely follows the general rule of equity pleading that a complaint should not be dismissed in *toto* unless the plaintiff is not entitled to any relief at all, and if the facts show that some relief should be given that relief should be allowed.

Here petitioners rely specifically upon the Civil Rights Laws, 8 U. S. C. A. 43 and 28 U. S. C. A. 1343 (3).

These statutes merely afford to any citizen claiming to be aggrieved by any wrong or injury involving infringement of his rights, privileges and immunities the right to institute a proceeding in the Federal court to remedy such wrong or injury.

We cannot conceive, in view of the established rules and principles hereinbefore discussed, that the statutes referred to were intended, or are deemed, to confer upon the Federal courts the power to act in a case of this character, where petitioners readily admit that the evidence taken by the local police is evidential *per se* of the crime they were committing. They are not entitled to have the Federal court restrain the State prosecuting officials from using the evidence against them in the State criminal prosecutions, a remedy which should be denied them by reason of the decisions of this Honorable Court.

VI.

Conclusion.

For the reasons hereinbefore discussed, we respectfully submit that the application for the writ of certiorari should be denied.

Respectfully submitted,

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BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 2.

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO,
Petitioners,

vs.

DUANE E. MINARD, Jr., Prosecutor for Essex County, New Jersey, *et als.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Opinion Below.

Following is the opinion of the United States Court of Appeals, Third Circuit, reported in *184 F. (2d) 575:*

> "The appeals in the instant cases are without merit. Every queston here raised by the appellants can be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. Federal Courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury

which is clear and imminent. Douglas *v.* Jeanette, 319 U. S. 157. As to the application of the principles of the Fourth Amendment to the cases at bar see Wolf *v.* Colorado, 338 U. S. 25. The judgments will be affirmed."

Counter-statement of the Case.

The petitioners herein were involved in two separate cases in the United States District Court, District of New Jersey, George Stefanelli being the plaintiff in one case, and Jerry Malanga, Joseph Maglione and Frank D'Innocenzio being plaintiffs in the other.

Both cases were treated separately in the District Court, but inasmuch as the same constitutional questions were involved in both cases, they were consolidated on appeal to the Court of Appeals, and are likewise consolidated before this Court.

Hereinafter we shall refer to the first case as the "Stefanelli" case, and to the second as the "Malanga" case.

In the Stefanelli case, on the afternoon of December 6th, 1949, at about 2:45 P. M. two detectives of the Essex County Prosecutor's Office and two local police officers of the City of Newark, Essex County, gained entrance into the premises of Stefanelli at 88 Tremont Avenue, Newark, without warrant of arrest or search warrant. In the premises the officers found Stefanelli in the act of violating what is known as the Bookmaking statute of New Jersey, by the taking of wagers and bets over the telephone upon the results of horse races. The officers placed Stefanelli under arrest, and they seized various slips, papers, sheets,

memoranda and paraphernalia pertaining to the offense that were in Stefanelli's immediate possession, custody and control.

Likewise, in the Malanga case, on the afternoon of April 3rd, 1950, at about 2:00 P. M. several local police officers of the City of Newark gained entrance into premises at 201 North 13th Street, Newark, without warrant of arrest or search warrant. In the premises the officers found Malanga, Maglione and D'Innocenzio in the act of violating the State Bookmaking statute by the taking down of wagers and bets over the telephone upon the results of horse races. The officers placed the three men under arrest, and they seized various slips, papers, racing sheets, memoranda and paraphernalia pertaining to the crime of Bookmaking under State law.

It is a criminal offense in New Jersey to commit what is commonly known as Bookmaking.

The statute makes it a misdemeanor to "make or take what is commonly known as a book, upon the running, pacing or trotting of any horse, mare or gelding;" and upon conviction there is a mandatory penalty of a fine of not less than $1,000. nor more than $5,000. *or* imprisonment for a term of not less than one year nor more than five years.[1]

In both cases, the persons arrested were arraigned without delay before a Police Magistrate on formal complaint and released on bail to await grand jury action.

Before any State criminal trial, in the Stefanelli case, a suit was instituted in the United States District Court

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[1] New Jersey Revised Statutes, Title 2:135-3.

against the County Prosecutor, the Chief of the Newark police, and the four police officers involved, wherein the plaintiff sought of the Federal court an injuncton restraining the State officials from using the evidence in the State trial.

Likewise in the Malanga case, a similar suit was instituted against the County Prosecutor, the local police chief, the local police commissoner, and the officers who participated in the raid, wherein similar injunctive relief was sought.

Motions were filed by the defendants in the District Court to dismiss the complaints upon agreed statements of fact; and after argument and consideration the District Court granted the motions for dismissal upon the ground that plaintiffs had failed to exhaust all available State remedies.

The Court of Appeals affirmed the judgment of the District Court upon the grounds (1) that plaintiffs had not exhausted all available State remedies including application for certiorari to this Court; (2) that they failed to show an exceptional case of irreparable injury that is clear and imminent; and (3) that the doctrine of *Wolf* v. *Colorado* is applicable. (See 184 F. 2d 575).

The cases are before this Court on certiorari granted May 14th, 1951 for review of the judgment of the Court of Appeals.

Summary of the Argument.

We respectfully submit:

1. The doctrine of *Wolf* v. *Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 is dispostive of this case. The admission in the State criminal prosecutions of the evidence obtained by the State officers is not forbidden.

2. Petitioners cannot invoke the remedy under the Civil Rights Acts to the extent of having the Federal court enjoin the State prosecuting authorities from using in the State criminal trials the alleged unlawful evidence obtained by the State officers.

3. The established policy of comity between the Federal and State governments and the rule of exhaustion of all available State remedies are applicable.

ARGUMENT.

POINT I.

The Federal Court properly refused to enjoin the State prosecuting authorities from using, in the State prosecutions, evidence allegedly procured by state officers in violation of the Fourth Amendment, under the doctrine of *Wolf* v. *Colorado*.

Briefly, the gist of petitioners' contention (B., pp. 10-32) seems to be that, the searches and seizures made by the State officers were a violation of the Fourth Amendment to the Federal Constitution; that because of the New Jersey rule of evidence that the fruits of an unreasonable

search and seizure are admissible in evidence in a State criminal trial if they are evidential *per se*, it would be futile for petitioners to attempt to seek any redress against the use of such evidence in the State courts; that the use of the evidence will result in a conviction for which petitioners will be subject to a mandatory fine or imprisonment thereby causing irreparable injury that is clear and imminent; therefore they should have the benefit of the equitable relief afforded by the Civil Rights Acts (8 U. S. C. A. 43 and 28 U. S. C. A. 1343) and have the Federal court restrain the State prosecuting authorities from using the unlawfully obtained evidence against them in the State criminal trials.

In the proceedings in the United States District Court, District of New Jersey, the following essential undisputed facts were submitted upon an "Agreed Statement of Facts"; (1) that the searches and seizures were made by local police officers of the City of Newark and detectives of the County Prosecutor's Office, [In the Stefanelli case, by two local police officers and two Prosecutor's detectives, R. p. 11, par. 1; in the Malanga case, by four local police officers, R. p. 24, par. 1]; (2) that the criminal offense involved was the making of book on the results of horse races, commonly referred to as Bookmaking, which is a crime under New Jersey State law (N. J. S. A. 2:135-3); and (3) that the property seized pertained to the crime of Bookmaking and was admissible in evidence under New Jersey law because it was evidential *per se*.

It is the respondents' contention that the doctrine laid down by this Court in *Wolf* v. *Colorado*, 338 U. S. 25; 69 S. Ct., 1359 is applicable, to the effect that, in a prosecu-

tion in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure on the part of State officers in the same manner that similar evidence procured by Federal officers would be inadmissible in a Federal prosecution in a Federal court under the doctrine of *Weeks* v. *U. S.*, 232 U. S. 383.

In the *Wolf* case, drawn from *Wolf* v. *People*, 187 F. (2) 926, representatives of the State District Attorney's office proceeded to Wolf's office without warrant of any kind. They took the defendant into custody and in searching the office they seized two "day books" for the years 1943 and 1944 containing defendant's records of patients who had consulted him professionally. The books were admitted in evidence at his trial and they were instrumental in bringing about his conviction for conspiracy to commit abortions. The Colorado Supreme Court affirmed the conviction.

On certiorari to this Court, the specific question presented was whether the seizure of the evidence by State officers in violation of the Fourth Amendment was a violation of due process under the Fourteenth Amendment merely because the same evidence would have been inadmissible under the doctrine of *Weeks* v. *U. S.*, 232 U. S. 383 in a similar prosecution in the Federal courts where the evidence had been seized by Federal officers.

This Court emphasized the principle that the Fourteenth Amendment has not absorbed the first eight amendments as such, when it stated (p. 1360 of 69 S. C.):

> "Unlike the specific requirements and restrictions placed by the Bill of Rights, Amendments I

to VIII upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, e. g. Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; Twining *v.* New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97; Brown *v.* Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; Palko *v.* Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. Adamson *v.* California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223. The issue is closed.'

We are mindful of various decisions of this Court wherein it has been held that the validity of certain immunities guaranteed against the Federal government by specific pledges of particular amendments in the Bill of Rights is equally binding upon the States. But only because those specific immunities have been considered to be "implicit in the concept of ordered liberty" and basic and fundamental to the right of life and liberty guaranteed by the Constitution, and thus those immunities have been brought within the scope of the Fourteenth Amendment.

Among those rights thus treated are "freedom of speech," (*Herndon* v. *Lowry*, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 422); "freedom of the press," (*Grosjean* v.

American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; *Lovell* v. *City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949); "freedom of religion" (*Hamiton* v. *Regents*, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343; *Marsh* v. *Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265); "freedom of speech and assembly" (*Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423); and the right, under certain circumstances, as in capital cases, to counsel in criminal prosecutions (*Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158; *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; *DeMeerleer* v. *Michigan*, 329 U. S. 663, 67 S. Ct. 596, 91 L. Ed. 584).

But not all of the rights and immunities guaranteed in the first eight amendments have been treated in the same manner.

For example, the Fifth Amendment provides that no person shall be held to answer for a capital or infamous crime unless on presentment or indictment of a grand jury, and it has been held that prosecution by a State may be on information at the instance of a public officer. (*Hortado* v. *California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Gaines* v. *Washington*, 277 U. S. 81, 48 S. Ct. 468, 72 L. Ed. 793).

While the Fifth Amendment also provides that no person in a criminal case shall be compelled to be a witness against himself, it has been held that a State may by law end that privilege in a State prosecution. (*Twining* v. *New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97).

It has also been held that the provisions of the Sixth and Seventh Amendments as to jury trials in criminal and civil cases may be modified by a State or abolished altogether. (*Maxwell* v. *Dow*, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597;

Wagner Electric Mfg. Co. v. *Lyndon*, 262 U. S. 226, 43 S. Ct. 583, 67 L. Ed. 961).

In *Palko* v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288, where double jeopardy was claimed because, after defendant's conviction of second degree murder was reversed, he was retried and convicted of first degree murder and sentenced to death; and it was held that there was no violation of due process because there is no "general rule" that whatever would be a violation of the first eight amendments if done by the Federal government is equally unlawful by force of the Fourteenth Amendment if done by a State.

It is submitted that this Court has not thus far brought a citizen's immunity from unreasonable search and seizure, under the Fourth Amendment, into the family of fundamental rights encompassed within the protection of the due process clause of the Fourteenth Amendment.

Many times attention has been invited to the established policy of both the Federal and State governments to treat possible conflict between their powers in such a manner as to produce as little conflict as possible.

In a concurring opinion of Justice Frankfurter in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, it is stated that (p. 470):

> "* * * great tolerance toward a State's conduct is demanded of this Court. * * *"

And in *Malinski* v. *New York*, 324 U. S. 401, 438, 65 S. Ct. 781, 799, 89 L. Ed. 1029, it is stated:

> "* * * And however reprehensible or even criminal the acts of the state officials may be, in so far as

> the conduct of the trial is concerned, they do not infringe due process unless they result in the use against the accused of evidence which is coerced or known to the State to be fraudulent or perjured, or unless they otherwise deny to him the substance of a fair trial, which is due process. * * * "

The constitutional provision against unreasonable search and seizure guaranteed by the Fourth Amendment does not in terms bar the admission of evidence obtained by its violation. The exclusionary rule of evidence as applied in the Federal courts under the *Weeks* doctrine, which has been affirmed in the *Wolf* case, was formulated by the judiciary in aid of the effectiveness of the amendment, and is available only in Federal trials where the evidence was obtained by Federal officers.

In the *Wolf* case, this Court stated (p. 1362 of 69 S. Ct.):

> " * * * But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. * * *When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. * * * "

And this Court stated that the application of the exclusionary rule under the *Weeks* doctrine is "less compelling" in the case of an unreasonable search and seizure made by local and State Officers because (p. 1364 of 69 S. Ct.):

> "* * * The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

The exclusionary rule under the *Weeks* doctrine is no more than a judicially constructed rule of evidence which can be changed at any time by Congressional legislation (p. 1364 of 69 S. Ct.):

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded to the legislative judgment on an issue as to which in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under par. 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States."

Petitioners fail to submit a single case where State prosecuting authorities were enjoined by the Federal court from using, at the State criminal trial, evidence obtained by unreasonable search and seizure by State officers, either by virtue of the Fourth Amendment or the Due Process

clause of the Fourteenth Amendment. In their Brief, petitioners cite and quote from numerous cases which we do not consider to be in point.

Perlman v. *U. S.*, 247 U. S. 7 and *Burdeau* v. *McDowell*, 256 U. S. 465, cited by petitioners (B., pp. 12-13), hold that the protection of the Fourth and Fifth Amendments may be had only when the wrong is committed by officers of the Government.

Here we are concerned with the activities of local and county enforcement officers and not Federal officers.

Hague v. *C.I.O.*, 307 U. S. 496, cited by petitioners (B., p. 13), involved the right of free speech and lawful assembly, and it was held that such rights are protected through the Fourteenth Amendment because such rights are implicit in the concept of ordered liberty.

In *Douglas* v. *Jeanette*, 319 U. S. 157, (B., p. 13), this Court approved the refusal of the Federal court to restrain municipal authorities from enforcing an ordinance prohibiting the distribution of pamphlets without first obtaining a license under penalty of fine or jail sentence, it being held that such interference was properly refused in the case of "threatened" criminal prosecution, and such refusal may be had on the Court's own motion.

Cases cited by petitioners on p. 14 of their Brief, (*Gouled* v. *U. S.*, 255 U. S. 298; *Agnello* v. *U. S.*, 269 U. S. 20; and *U. S.* v. *Lefkowitz*, 285 U. S. 452) were Federal prosecutions in the Federal courts and they did not involve the specific question here presented.

In petitioners' discussion of the *Wolf* case, they make the statement that, "In New Jersey, the courts have af-

firmatively sanctioned 'police incursions into privacy,'" and they attribute such so-called "police incursions" to the observance of the State rule of evidence to the effect that evidence procured by unreasonable search and seizure is admissibe if evidential *per se*, closing their argument with the following italicized conclusion (B., p. 28):

> "*Therefore, there is an affirmative sanction by the New Jersey courts of the police incursions complained of by petitioners and runs counter to the guaranty of the Fourteenth Amendment,* Wolf *v.* Colorado, *supra.*"

We respectfully submit that there is no basis whatsoever for any such statements of "affirmative sanction" on the part of the New Jersey courts as petitioners intimate.

New Jersey is only one of the great majority of the States which have rejected the *Weeks* doctrine as applied to State action. (See Justice Frankfurter's Appendix to the *Wolf* decision).

The rule as applied in New Jersey is a simple one and it was observed prior to the *Weeks* doctrine of 1914. It merely states a rule of evidence whereby evidence obtained by State officers in the enforcement of the State criminal laws which has been obtained without search warrant may be received in evidence provided it is evidential *per se;* that is, the evidence, in and of itself, must tend to show the commission of the crime under consideration.

The basis for the rule is that the rights guaranteed in the Bill of Rights of the Federal Constitution are limited to the sphere of the Federal Government, its courts and officers, and constitute no prohibition upon the States.

Cases cited by petitioners (B., pp. 28-29) (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Carter* v. *Illinois*, 329 U. S. 173; and *Snyder* v. *Massachusetts*, 291 U. S. 97) are not in point.

In *Oklahoma Natural Gas Co.* v. *Russell*, the rule that principles of comity should give way to constitutional rights was based upon the particular circumstances of that case. There certain gas companies supplying customers in Oklahoma applied to the State Commission for an increase of rates and were refused. An application to the State Supreme Court for a supersedeas was also refused. Then they applied to the Federal court for injunctive relief upon the ground that the rates fixed by the State Commission were confiscatory and a denial of their constitutional rights. Their application for injunctive relief heard by three Federal District judges was denied. On appeal to this Court, it was held that the companies had done all they could under State law, giving rise to the statement that, "Rules of comity or convenience must give way to constitutional rights," and the cases were remanded to give the plaintiffs an opportunity of showing irreparable injury that was great and immediate.

In *Carter* v. *Illinois*, the question involved was the defendant's right to the aid and assistance of counsel, and it was held that there was nothing in the case to indicate any infringement of that constitutional right.

In *Snyder* v. *Massachusetts* (prosecution for murder), it was held that the trial court's refusal to permit the defendant to be present when the jury viewed the scene of the crime was not a violation of due process.

Cases cited (B., p. 30) (*Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; and *Harris* v. *South Carolina*, 338 U. S. 68) involved the denial of due process under the Fourteenth Amendment because of "fundamental unfairness" in connection with confessions extracted from defendants, and the principles there involved cannot be applied here.

These cases involving extorted confessions cannot be used by way of analogy to the case at bar. There is a vast difference between an extorted confession and property taken by unlawful search and seizure. A coerced confession carries doubtful truth, while tangible property taken by search and seizure carries every likelihood of truth. There is no evidential trustworthiness in a coerced confession; but there is evidential truth in seized property. The truth value of seized property is independent of the method of procuring it. (See Wigmore on Evidence, 3d Ed., Vol. III, Sec. 822).

Williams v. *U. S.*, 71 S. C. 576 (decided April 23rd, 1951 and cited by petitioners, B., p. 30) is not in support of petitioners' contention that the right to injunctive relief is afforded by Sections 8 U. S. C. A. 43 and 28 U. S. C. A. 1343 of the Civil Rights Laws. In that case, Williams, a special police officer who had forced confessions from several persons he suspected of crime, was tried and convicted under Par. 20 of the U. S. Criminal Code (now Par. 242 of 18 U. S. C. A.) providing for punishment for whoever under "color of law" wilfully subjects an inhabitant of a State to deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States; and in affirming the judgment of conviction this Court held

that a private officer is a person "under color of law" within the intendment of the section of the Civil Rights Law under consideration; that such officer was deemed to be exercising the authority of the State; and any confessions wrung by him from the suspects by force and violence were a violation of due process and not admissible in evidence.

Cases cited by petitioners (B., p. 31), *Everson* v. *Board of Education*, 330 U. S. 1 (constitutionality of state statute providing for transportation of pupils to and from schools); *West Virginia State Board* v. *Barnette*, 319 U. S. 634 (constitutionality of regulation requiring school children to salute the American flag); and *Bridges* v. *California*, 314 U. S. 252 and *Hague* v. *C. I. O.*, *supra*, involving the protection of the 14th Amendment against violation of the right of free speech guaranteed under the First Amendment, are not applicable.

As we have heretofore pointed out, the rights of free speech and the right to freedom from self-incrimination, under the First and Fifth Amendments, have been held to be protected against State action through the due process clause of the 14th Amendment, upon the ground that such rights are "implicit in the concept of ordered liberty." (*Palko* v. *Connecticut*, *supra*).

But the right to freedom from unreasonable search and seizure against State action has not been placed in the same category. (*Wolf* v. *Colorado*, *supra*).

On page 31 of their Brief, petitioners make the statement that, "The Fourth Amendment is as equally applicable to the States as are the First and Fifth Amendments," and that there should be no distinction in their application

to State action, quoting in support from the concurring opinion of Mr. Justice Black in the *Wolf* case.

It is to be noted that Mr. Justice Black, in his concurring opinion, states that while he agrees that the Fourth Amendment is enforceable against the States, he also agrees that the method of enforcement should not be by barring the use of evidence unlawfully obtained, as follows (p. 1367 of 69 S. Ct.):

> "• • • • I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures', but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. See McNabb *v.* United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819. This leads me to concur in the Court's judgment of affirmance."

POINT II.

Petitioners cannot invoke the Civil Rights Acts to the extent of having the Federal Court restrain the State from using, in State prosecutions, evidence allegedly obtained in violation of the Fourth Amendment.

As we pointed out under Point I, the doctrine of the *Wolf* case is that, although the right guaranteed by the

Fourth Amendment against unreasonable searches and seizures may be binding upon the States as well as the Federal government, the same method of enforcement of the right employed in the Federal courts against Federal officers by means of the exclusionary rule under the *Weeks* doctrine cannot be employed against the States in State criminal prosecutions, because the exclusionary rule is not a command of the Fourth Amendment but merely a judicially created rule of evidence which Congress at any time might negate.

It is the respondents' contention that, in view of the Wolf doctrine the petitioners cannot avoid the application of that doctrine by resorting to the Civil Rights Acts to accomplish their purpose, and the statutes cannot be used as a vehicle for a Federal civil action in equity to restrain State officials from using the alleged unlawfully procured evidence in the State criminal trials.

Following are the statutes upon which petitioners rely:

Title 8 U. S. C. A. Sec. 43 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress."

Title 28 U. S. C. A. Sec. 1343 provides:

> "(a) The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constituttion of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Petitioners in their suit did not seek damages, compensatory or punitive, or both, for the alleged infringement of their constitutional rights from the State officers. They sought only the "suppression" of the illegal evidence by having the Federal court issue an injunction against the State officials to restrain them from using the evidence at petitioners' State trial.

Petitioners state, page 25 of their Brief:

> "* * * the petitioners * * * *seek only to suppress the evidence unlawfully and unreasonably taken from them. They do not seek to enjoin the respondents from prosecuting them upon the indictments* now pending against them in the New Jersey Courts, and which arise from their arrests after the unlawful searches and seizures of which they complain in these proceedings."

Cases cited and quoted from by petitioners (B., p. 33) (*Keiser* v. *Walsh*, 118 F. (2) 13; *Ware* v. *Travelers Ins. Co.*, 150 F. (2) 463; and *Bell* v. *Hood*, 327 U. S. 678) merely uphold the rule of pleading that a complaint seeking equitable relief should not be dismissed in toto unless the plaintiff is not entitled to any relief at all, and if the facts warrant any relief at all that relief should be allowed.

We do not quarrel with the rule except that in the instant case petitioners sought only the injunctive relief to

restrain State officials from using the evidence illegally procured, and, under the *Wolf* doctrine, they were not entitled to such relief.

We have discussed the case of *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290 under our Point I and it is not in point.

Massachusetts State Grange v. *Benton*, 272 U. S. 525, cited and quoted from B., p. 35, would seem to support the respondents' position in the case at bar. There the plaintiffs sought the aid of the District Court to restrain State officials from carrying out the provisions of a State Daylight Saving Law upon the ground that it was inconsistent with a Federal statute and that it was unconstitutional; and this Court affirmed the dismissal of the proceeding for failure to show the necessity for the relief under the applicable rule that no injunction should issue against State officers with authority to enforce a State law "unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."

We submit that in the instant case the petitioners readily admit that the evidence seized pertained to a violation of the New Jersey Bookmakng statute and that it was evidential *per se* under the New Jersey rule of evidence.

The irreparable injury they claim they would suffer by use of the evidence is that it would lead to a conviction and mandatory penalty of fine or imprisonment.

Is this the nature of "irreparable harm and injury" which a person is entitled to be relieved of under the Civil Rights Laws by having the Federal court issue an injunc-

tion to stay the arm of State officials authorized to enforce the criminal laws?

Cases we have examined wherein relief was sought under the Civil Rights Laws have been cases where the plaintiffs sought damages. (See *McShane* v. *Moldovan*, 172 F. 2d 1016, C. C. A. 6th, 1949; and *Picking* v. *Penn. R. Co.*, 151 F. 2d 240, C. C. A. 3d, 1945).

Screws v. *U. S.*, 325 U. S. 91, 63 S. Ct. 1031 was a case where a criminal action was brought against State officials for violation of due process based upon 18 U. S. C. A. Sec. 52 and 88, and in upholding the conviction this Court held that such a proceeding was proper against State officers acting under "color of law". (See *Williams* v. *U. S.*, *supra*).

The only case we have been able to find of similar character to the case at bar is *Erickson* v. *Hogan*, 94 F. Supp. 459 (D. C. S. D. N. Y. 1950). There the plaintiff, under 28 U. S. C. A. 1343, brought suit in the District Court to enjoin the New York District Attorney and others from the use, and to compel the return, of property taken from plaintiff by State and City law enforcement officials. The injunction was denied upon the ground that plaintiff had available to him a remedy under State law. The Court followed *Wolf* v. *Colorado*, *supra*, to the effect that due process of law under the 14th Amendment is not violated by the use of unlawfully seized property in State prosecutions. The Court held that plaintiff was not entitled to injunctive relief, although he was given the opportunity of amending his complaint so as to claim monetary damages.

In the case at bar, upon being denied the injunctive relief sought, petitioners could have requested, and undoubt-

edly they could have obtained, an amendment of their complaint so as to allow them to claim compensatory or punitive damages.

But this they did not desire, and they did not request any amendment of their complaints.

As to availability of remedy under State Law, which we shall discuss under Point III, petitioners can object to the admission of illegal evidence at their State trial, and if convicted, they can apply immediately to the Supreme Court of New Jersey upon the constitutional question involved (permissible under the N. J. Rules of Practice and Procedure), and upon an adverse decision, they can apply to this Court for review by certiorari (*Darr* v. *Burford*, 70 S. Ct. 587).

In *Hague* v. *C. I. O.*, *supra*, this Court discussed the narrow limitation of the jurisdiction of the Federal courts under the Civil Rights Acts, as follows (p. 507 of 307 U. S.):

> "First. Every question arising under the Constitution may, if properly raised in a state court, come ultimately to this court for decision. Until 1875, save for the limited jurisdiction conferred by the Civil Rights Acts, infra, federal courts had no original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States; and the jurisdiction then and since conferred upon United States courts has been narrowly limited."

POINT III.

The principles of exhaustion of State remedies and of comity between the Federal Government and the States are applicable.

Our New Jersey Constitution has a provision identical to the Fourth Amendment to the Federal Constitution.

Art. 1, Par. 7 of the New Constitution of 1947 provides:

> "The right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and things to be seized."

The court of last resort in New Jersey is the Supreme Court of New Jersey; under the former Constitution of 1844 it was the Court of Errors and Appeals.

The rule of evidence has been followed in New Jersey that property unlawfully taken by unreasonable search and seizure is admissible in evidence if evidential *per se*. (*State* v. *MacQueen*, 69 N. J. L. 522; *State* v. *Mausert*, 88 N. J. L. 286; *State* v. *Giberson*, 99 N. J. L. 85; *State* v. *Lyons*, 99 N. J. L. 301; *State* v. *Black*, 5 N. J. Misc. 48; *State* v. *Pinsky*, 6 N. J. Super. 90).

Only the *Mausert*, *Giberson* and *Lyons* cases reached the former Court of Errors and Appeals. In the *MacQueen* case the opinion was rendered in the former New Jersey

Supreme Court by Justice Pitney who later became a member of the United States Supreme Court.

Examination of those cases will disclose that in the *Mausert* case (disorderly house) certain books were seized by the officers armed with an arrest warrant, and it was held that the seizure was not unreasonable because the books were found in defendant's immediate control.

In the *Giberson* case (murder), officers going to defendant's home without warrant seized papers and documents, and the search and seizure were held to be not unreasonable because the property was taken with defendant's "full consent".

In the *Lyons* case (disorderly house), officers raided defendant's gambling house above a saloon also conducted by defendant. At the time of the arrest, the officers seized some papers from a file on the back-bar of the saloon portion of the premises, and the papers were held to be admissible to establish ownership and control by the defendant.

In the *MacQueen* case (riot), regarded as the leading case on the subject, a newspaper article written by defendant was taken from him while under arrest, and it was a question whether the seizure was a reasonable one, the Court stating (p. 528 of opinion): "And it would seem after arrest made the person of the accused may properly be examined without a search-warrant in order to find evidence of his guilt, and that such an examination would not be deemed an unreasonable search."

The same constitutional questions raised in the Federal courts can well be urged in the State courts of New Jersey

during the criminal prosecutions; and the same questions may be raised on appeal before the State court of last resort. Thereafter, if adversely determined, petitioners may apply to this Court for review by certiorari, as was done in the *Wolf* case, *supra*.

Under our present Rules of practice and procedure, petitioners may apply directly to the Supreme Court for certification to the trial court when a substantial constitutional question arises.

New Jersey Supreme Court Rule 1:5-3 provides:

> "Petitions for certification to the trial courts will be entertained on final judgments only in the following types of cases:
>
> "(a) Where a substantial question arises under the Constitution or a statute of the United States or of this State, which is of general public importance and which urgently requires adjudication by this court."

The doctrine of exhaustion of state remedies and the rule of comity has been abundantly supported by this Court.

In *Darr* v. *Burford, supra*, a prisoner serving a sentence under a State conviction applied for habeas corpus in the State courts, claiming he had been deprived of his constitutional rights relating to right of counsel. After exhausting his remedies in the State courts he applied for habeas corpus in the Federal District Court and his application was denied. The denial was upheld by the Circuit Court of Appeals. On certiorari, this Court held that the habeas corpus was properly denied, because, in order to comply with the rule of exhaustion of State remedies and the rule of comity, the defendant should have applied to this Court

for certiorari immediately after the determination by the State Supreme Court which had passed squarely upon the constitutional questions involved. In reaffirming the rule of comity and the doctrine of exhaustion of State remedies, this Court emphasized the necessity of avoiding conflict between Federal and State courts, whereby one court refuses to take action until the courts of another sovereignty had had an opportunity of passing on the matter. It approved the following language taken from *Covell* v. *Heyman*, 111 U. S. 176, 182 (p. 591 of opinion in 70 S. Ct.):

> " 'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity.' "

See also *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Trent* v. *Hunt*, 39 F. Supp. 376; aff'd 314 U. S. 573, 62 S. Ct. 115, 86 L. Ed. 465.

In *Parker* v. *County of Los Angeles*, 338 U. S. 327; 70 S. Ct. 161, which involved the constitutionality of a California statute providing for a "Loyalty Check" program, this Court again affirmed the rule of comity and exhaustion of State remedies in the following emphatic language (p. 163 of opinion in 70 S. Ct.):

> " * * * If their claims are recognized by the California courts, petitioners would of course have no basis for asserting denial of a Federal right. It will

be time enough for the petitioners to urge denial of a Federal right after the State courts have definitely denied their claims under State law.

"Due regard for our Federal system requires that this Court stay its hand until the opportunities afforded by State courts have exhausted claims of litigants under State law. This is not what is invidiously called a technical rule. The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken with knowledge of the events brought to light for the first time at the bar of this Court. Since the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision, all subsidiary questions fall." (Cases cited).

In the instant cases, we submit the State courts are competent to decide whether petitioners had been deprived of their constitutional rights. The appropriate time for the determination of any constitutional question is at the trial of the indictments in the State courts and on appeal to the New Jersey Supreme Court. If the trial court should err to the prejudice of petitioners' constitutional rights it cannot be assumed that the New Jersey Supreme Court would suffer the error to go uncorrected. Under any circumstances, petitioners can always apply to this Court for writ of certiorari to review any abridgement of their constitutional rights by the court of last resort of New Jersey.

We submit the Court of Appeals properly affirmed the District Court's dismissal of the proceedings by stating:

"Every question here raised by the appellants may be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open."

Conclusion.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the Court below should be affirmed.

Respectfully submitted,

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